87-416

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

v.

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1486—August Term, 1985

(Argued: June 25, 1986 Decided: June 4, 1987)

Docket No. 86-6092

IN RE UNITED STATES CATHOLIC CONFERENCE and NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Appellants,

ABORTION RIGHTS MOBILIZATION, INC., LAWRENCE LADER, MARGARET O. STRAHL, M.D., HELEN W. EDEY, M.D., RUTH P. SMITH, NATIONAL WOMENS HEALTH NETWORK, INC., LONG ISLAND NATIONAL ORGANIZATION FOR WOMEN-NASSAU, INC., RABBI ISRAEL MARGOLIES, REVEREND BEA BLAIR, RABBI BALFOUR BRICKNER, REVEREND ROBERT HARE, REVEREND MARVIN G. LUTZ, WOMENS CENTER FOR REPRODUCTIVE HEALTH, JENNIE ROSE LIFRIERI, EILEEN WALSH, PATRICIA SULLIVAN LUCIANO, MARCELLA MICHALSKI, CHRIS NIEBRZYDOWSKI, JUDITH A. SEIBEL, KAREN DECROW and SUSAN SHERER,

Plaintiffs-Appellees,

— v. —

JAMES A. BAKER, III, Secretary of the Treasury,
and ROSCOE L. EGGER, JR.,
Commissioner of Internal Revenue,
Defendants.

Before:

NEWMAN, KEARSE, and CARDAMONE,
*Circuit Judges.**

Appeal from a judgment of the District Court for the Southern District of New York (Robert L. Carter, Judge) holding witnesses in civil contempt; witnesses attempt to challenge the District Court's subject matter jurisdiction over the lawsuit in which they have been compelled to furnish evidence.

Affirmed. Judge Kearse concurs with a separate opinion. Judge Cardamone dissents with a separate opinion.

Wilfred R. Caron, Gen. Counsel, United States Catholic Conference, Wash., D.C. (Charles H. Wilson, Richard S. Hoffman, Williams & Connolly, Wash., D.C.; Mark E. Chopko, Asst. Gen. Counsel, U.S. Catholic Conference, Wash. D.C.; Joseph B. Valentine, Hughes Hubbard & Reed, New York, N.Y., on the brief), for appellants.

Marshall Beil, New York, N.Y., for plaintiffs-appellees.

Gerald T. Ford, Asst. U.S. Atty., New York, N.Y. (Rudolph W. Giuliani, U.S. Atty., Jane E Booth and Steven E. Obus, Asst. U.S. Attys., New York, N.Y., on the brief), for defendants.

(Prof. Edward McGlynn Gaffney, Jr., Loyola Law School, Los Angeles, Cal., and Michael J. Woodruff, Samuel E. Ericson, Kimberlee Wood Colby, Merrifield, Va., filed a brief on behalf of National Council of Churches of Christ in the U.S.A., et al., as amici curiae.)

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* Judge Mansfield, originally a member of the panel, died on January 7, 1987. Judge Kearse has been appointed to the panel pursuant to Local Rule § 0.14(b).

JON O. NEWMAN, *Circuit Judge*:

This appeal from an adjudication of civil contempt presents the interesting and apparently novel question whether a non-party witness has standing on appeal to challenge a district court's subject matter jurdisdiction over the lawsuit in which the witness has been compelled to furnish evidence. The issue arises on an appeal by the United States Catholic Confernce ("USCC") and the National Conference of Catholic Bishops ("NCCB") (collectively "the witnesses") from orders of the District Court for the Southern District of New York (Robert L. Carter, Judge) entered May 8 and 9, 1986. The witnesses were held in civil contempt and subjected to coercive daily fines for their refusal to comply with discovery orders entered in a lawsuit brought to challenge the federal tax-exempt status of the Roman Catholic Church in the United States. The lawsuit has been brought by various organizations and individuals who contend, among other things, that they are injured by the Government's permitting the Catholic Church to retain its tax-exempt status while engaging in political activities that the plaintiffs contend violate the limitations imposed by section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) (1982). The witnesses challenge the contempt adjudication solely on the ground that the plaintiffs lack standing to bring the lawsuit. Without making any definitive ruling on the standing of the *plaintiffs*, we conclude that the *witnesses* have standing to question only whether the District Court has a colorable basis for exercising subject matter jurisdiction, that such colorable basis exists, and that in the absence of any challenge to the discovery orders that implicate personal rights of the witnesses, the orders adjudicating them in civil contempt should be affirmed.

I.

The plaintiffs are nine organizations and twenty individuals, all of whom act in one or more capacities to

support the constitutional right of women to choose an abortion. Three of the organizations are active in advocating the right to an abortion. Six of the organizations are health clinics that perform abortions. The individuals include persons identified as officers of or contributors to the advocacy organizations, a physician who performs abortions, clergymen whose religious tenets hold it permissible for women to choose an abortion, and Roman Catholics who contribute to the Roman Catholic Church but oppose the Church's position on abortion. All of the individual plaintiffs are voters and taxpayers. The complaint named as defendants the Secretary of the Treasury and the Commissioner of Internal Revenue ("the federal defendants"), and the USCC and the NCCB, alleged in the complaint to be "the two principal national organizations of the Roman Catholic Church in the United States."

The complaint recites the language of section 501(c)(3) of the Internal Revenue Code, defining a tax-exempt organization as one

> which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

26 U.S.C. § 501(c)(3). The complaint alleges that this prohibition on political activity by tax-exempt organizations is constitutionally required with respect to religious organizations by the First Amendment. The plantiffs then allege various activities undertaken by the Roman Catholic Church that are claimed to constitute "interven[tion] in political campaigns to further [the Church's] religious belief that no one should be able to obtain an abortion in the United States." These activities, undertaken without loss of the Church's tax-exempt status, are alleged to have injured the plaintiffs in various ways. The primary injury allegedly sustained is that the plaintiffs are disadvantaged in the political arena with respect

to political activity on behalf of pro-abortion or pro-choice candidates because the plaintiffs abide by the political action prohibition of section 501(c)(3) while the Church allegedly does not. Some of the plaintiffs also allege that they are injured as taxpayers on the theory that a tax exemption for a religious organization engaging in political activity constitutes a government expenditure to establish a religion and injured as voters on the theory that the toleration of political activity by the Church while plaintiffs limit their activity in observance of section 501(c)(3) has diminished plaintiffs' right to vote.

The complaint alleges five causes of action. The first claims that the activities of the Roman Catholic Church violate section 501(c)(3) and the First Amendment. The remaining four allege that the failure of the federal defendants to revoke the tax-exempt status of the Catholic Church violate their duties under the Code and various provisions of the Constitution.

All four of the original defendants moved to dismiss on various grounds, including the plaintiffs' lack of standing and failure to state a claim. On July 19, 1982, the District Court granted the motion by the USCC and the NCCB to dismiss Count One for failure to state a claim. *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471, 487 (S.D.N.Y. 1982). Since this was the only count alleging a cause of action against the two Catholic organizations, that ruling removed them from the case as defendants. The Court denied the motion by the federal defendants, concluding that, except for five health service clinics, all other plaintiffs had standing to sue. The District Judge also denied a motion by the federal defendants to certify his ruling denying their motion to dismiss for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Abortion Rights Mobilization, Inc. v. Regan*, 552 F. Supp. 364 (S.D.N.Y. 1982).

In early 1983, both the plaintiffs and the federal defendants served deposition subpoenas duces tecum on the USCC and the NCCB. The plaintiffs' subpoenas, which were received by the witnesses' counsel on March 2, 1983, have given rise to the pending appeal. These subpoenas seek various documents concerning allegedly political activities engaged in by the USCC and the NCCB, including records of financial support of political candidates and organizations. On April 4, 1984, the District Court denied a motion to quash the plaintiffs' subpoenas. No production of documents occurred, the witnesses apparently anticipating that their obligation to comply might be removed by an anticipated decision of the Supreme Court in litigation concerning the standing of parents of Negro children to challenge the tax-exempt status of racially segregated private schools. *See Allen v. Wright*, 468 U.S. 737 (1984). Shortly after the Supreme Court ruled against standing in *Allen v. Wright, supra*, the federal defendants renewed their motion to dismiss. The District Court denied that motion on March 1, 1985, *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985), and subsequently denied certification for interlocutory appeal under section 1292(b).

On June 18, 1985, the plaintiffs sought enforcement of their subpoenas by moving for an order holding the witnesses in contempt. In subsequent pretrial conferences, the District Court questioned whether two paragraphs of the subpoenas, those calling for production of minutes of internal church meetings, might encounter First Amendment objections. In an order on September 4, 1985, Judge Carter ruled that documents called for by these two paragraphs need not be produced "at this time," and that these requests should be narrowed. At the same time he ordered the witnesses to comply "forthwith" with all other requests of the subpoenas and denied the plaintiffs' motion for contempt, without prejudice to renewal in the event of noncompliance. Thereafter, the plaintiffs withdrew the two questioned paragraphs of their subpoenas and also agreed with the witnesses to the entry of a confidentiality order.

Compliance was delayed pending the outcome of a mandamus petition to this Court, challenging Judge Carter's denial of the federal defendants' renewed motion to dismiss. This Court denied the mandamus petition on January 14, 1986, in an unreported order. *In re Baker*, No. 85-3056 (2d Cir. Jan. 14, 1986). On February 26, 1986, Judge Carter denied plaintiffs' renewed motion to hold the witnesses in contempt, again without prejudice to renewal. However, he directed the witnesses to comply with the subpoenas by March 7, 1986, unless this Court in the interim granted rehearing of the ruling denying mandamus. This Court denied rehearing on March 3, 1986. Thereafter plaintiffs renewed their motion to hold the witnesses in contempt.

On May 8, 1986, Judge Carter issued the ruling that is the subject of this appeal. *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337 (S.D.N.Y. 1986). Noting the prolonged period during which the witnesses had refused to comply with the subpoenas, a period then extending more than three years, Judge Carter expressed the view that the witnesses had "wilfully misled the court and the plaintiffs and made a travesty of the court process." *Id.* at 337. The District Court ruled that the witnesses were in civil contempt for refusing to comply with the February 26, 1986, order of the Court requiring document production. Judge Carter imposed a daily fine of $50,000 commencing May 12, 1986, until the witnesses complied. On May 9, 1986, Judge Carter amended his May 8 ruling to entitle the plaintiffs to attorney's fees with respect to designated aspects of the pretrial proceedings, with the amount of fees to be determined after disposition of this appeal. He also stayed the May 8 order until May 16, 1986. This Court subsequently continued that stay pending disposition of this appeal.

Discussion

A witness adjudicated in civil contempt for failure to comply with discovery orders unquestionably has a right to appeal from the contempt order, notwithstanding the lack of a final judgment in the underlying lawsuit in which discovery was sought. *E.g., In re Manufacturers Trading Corp.*, 194 F.2d 948 (6th Cir. 1952); *Fenton v. Walling*, 139 F.2d 608 (9th Cir.), *cert. denied*, 321 U.S. 798 (1944); *see Alexander v. United States*, 201 U.S. 117, 122 (1906); *see generally* 9 *Moore's Federal Practice* ¶ 110.13[4] at 167 (1986 & Supp. 1986-87). In this respect a witness has appellate rights superior to those of a party. A party held in civil contempt in the course of a civil lawsuit may not obtain review of the contempt order prior to an appeal from a final judgment in the underlying lawsuit. *International Business Machines Corp. v. United States*, 493 F.2d 112, 117-19 (2d Cir.), *cert. denied*, 416 U.S. 995 (1974).

In challenging their adjudication of civil contempt, the USCC and the NCCB make no claim whatever concerning the substance of either the orders requiring them to comply with the subpoenas duces tecum or the order holding them in contempt for noncompliance. The only claim made on this appeal is that the District Court lacks subject matter jurisdiction of the plaintiffs' suit against the federal defendants; in urging that jurisdiction is lacking, the witnesses, supported by the federal defendants, argue that the plaintiffs lack standing. Thus, the threshold issue we confront is whether the witnesses have standing to challenge their contempt adjudication on the ground that the District Court lacks subject matter jurisdiction over the lawsuit in which they have been obliged to produce evidence.[1] The issue appears to be one

[1] We need not decide whether the rule of *International Business Machines Corp. v. United States, supra*, would bar a *party's* interlocutory challenge to a civil contempt adjudication on the ground of lack of subject matter jurisdiction over the underlying lawsuit.

of first impression, at least in the context of civil litigation.

The most pertinent authority is the decision of the Supreme Court in *Blair v. United States*, 250 U.S. 273 (1919). In that case three witnesses were subpoenaed in Michigan to testify and produce records before a federal grand jury in the Southern District of New York. The grand jury was investigating possible violations of federal election laws in connection with a primary to select a candidate for United States Senator from Michigan. The witnesses appeared but refused to testify. They contended that the federal election laws were unconstitutional to the extent that they were sought to be applied to primary elections and that "because of the invalidity of these statutes, neither the United States district court nor the federal grand jury has jurisdiction to inquire into primary elections or to indict or try any person for an offense based upon the statutes. . . ." *Id.* at 278-79. The witnesses were adjudicated in civil contempt and held in custody until they complied with the subpoenas.

The Supreme Court affirmed the denial of writs of habeas corpus. The Court declined to consider the jurisdictional objections sought to be raised by the witnesses, stating that a witness "is *not interested* to challenge the jurisdiction of court or grand jury over the subject-matter that is under inquiry." *Id.* at 279 (emphasis added). Qualifying this statement slightly, the Court said that a witness "is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization." *Id.* at 282. *See In re Maury Santiago*, 533 F.2d 727, 730 (1st Cir. 1976).

A *party* entitled to appeal an interlocutory ruling may challenge the subject matter jurisdiction of the district court over the lawsuit in which the ruling was made, *see Delta Coal Program v. Libman*, 743 F.2d 852, 854 (11th Cir. 1984) (appeal of order permitting substitu-

tion of plaintiffs); *San Filippo v. United Brotherhood of Carpenters & Joiners*, 525 F.2d 508, 513 (2d Cir. 1975) (appeal of preliminary injunction). *But cf. Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1158 (7th Cir. 1984) (in banc) (party held in criminal contempt for failure to produce required discovery may not challenge on appeal from contempt adjudication a *res judicata* ruling that would defeat the underlying lawsuit), *rev'd on other grounds*, 470 U.S. 373 (1985). However, *Blair* stands for the proposition that a *witness* has more limited standing. Though the contempt adjudication of the witness is final and hence appealable, that appeal brings up for review only issues in which the witness is legally "interested," *Blair v. United States*, *supra*. Doubtless, these would include any issue that concerns the witness personally, such as the district court's personal jurisdiction over the witness, *see United States v. Thompson*, 319 F.2d 665, 668 (2d Cir. 1963), or any privilege the witness may have to resist divulging the information sought, *see Hickman v. Taylor*, 153 F.2d 212, 214 (3d Cir. 1945) (in banc), *aff'd*, 392 U.S. 495 (1947). With respect to jurisdiction over the underlying action, however, *Blair* instructs that the witness may make only the limited challenge as to whether there exists a colorable basis for exercising subject matter jurisdiction, and not a full-scale challenge to the correctness of the district court's exercise of such jurisdiction.

The federal defendants contend that *Blair* should be limited to the context of a grand jury witness. They view *Blair* as merely an example of the Court's philosophy that "encouragement of delay is fatal to the vindication of the criminal law," *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). It is true that *Blair* discusses the traditionally broad scope of a grand jury's authority, 250 U.S. at 282-83. But we think the decision was intended to state a rule of wider application. The Court's opinion surveys a range of statutes imposing a general

obligation on witnesses in all proceedings to give testimony, subject only to constitutional and other privileges. *Id.* at 280-81. Explicit reference is made to witnesses in civil cases. *Id.* at 280. From this review the Court concludes, "In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court *or* grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned . . . ." *Id.* at 281 (emphasis added). After this discussion the Court states as a rule that a witness "is not entitled to challenge the authority of the court *or* of the grand jury provided they have a *de facto* existence and organization." *Id.* at 282 (emphasis added). If the Supreme Court in *Blair* had intended to rely on the broad scope of a grand jury's investigative authority rather than the narrow scope of a witness's permissible challenge to subject matter jurisdiction, one would have expected the Court to entertain the witness's jurisdictional challenge and summarily reject it on its merits. Instead, the Court upheld the contempt adjudication, not because the questions asked of the witness were found to be within the grand jury's far-ranging authority, but because the witness had no standing to complain that subject matter jurisdiction had been exceeded.

Moreover, the federal defendants take a somewhat inconsistent position in urging us to limit *Blair* to grand jury witnesses because of the strong policy of avoiding delay in criminal cases. Expanding their argument that the witnesses in this civil case have standing to challenge the subject matter jurisdiction of the District Court in the underlying lawsuit, the federal defendants contend that a witness in a criminal trial could make a similar challenge to a contempt adjudication for failure to testify. Letter from Assistant United States Attorney Gerald T. Ford to Clerk of Court (June 26, 1986). We agree that a witness's standing to challenge subject

matter jurisdiction in an underlying lawsuit should not depend on whether that suit is civil or criminal, but we think that such standing is unavailable regardless of the nature of the proceeding to which the witness is called.

Furthermore, we note the interesting citation of *Blair* by the Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), a case principally relied on by the witnesses and the federal defendants in support of their challenge to the subject matter jurisdiction of the District Court. In ruling against standing to challenge a governmental donation of property alleged to violate the Establishment Clause, the Court noted that it had regularly " 'refrain[ed] from passing upon the constitutionality of an act [of the representative branches] unless obliged to do so in the proper performance of our judicial function, when the question is raised by a *party whose interests entitle him to raise it.*' " *id.* at 474; the internal quotation is from *Blair v. United States*, *supra*, 250 U.S. at 279 (brackets in original; emphasis added). Apparently the Court believed that *Blair* had relevance to the civil context.

More fundamental than their effort to restrict *Blair* to the grand jury context is the contention of the witnesses and the federal defendants that the lack of subject matter jurisdiction over the underlying lawsuit impairs the power of the district court to order the witnesses to produce evidence and to adjudicate them in contempt for their refusal. If the absence of subject matter jurisdiction over the underlying suit would preclude the District Court from ordering a witness to produce evidence and effecting compliance, then we would agree that the witness would have standing to assert such a claim on appeal from an adjudication of contempt. We disagree, however, with the premise.

A lack of subject matter jurisdiction does not disable a district court from exercising all judicial power. It is

familiar ground that even a court lacking subject matter jurisdiction may conduct appropriate proceedings to determine whether it has jurisdiction and that such proceedings may include the issuance of an injunction to preserve the status quo and an adjudication of criminal contempt for violation of such an injunction. *See United States v. United Mine Workers*, 330 U.S. 258, 293 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 436-37 (1911); *United States v. Shipp*, 203 U.S. 563, 573 (1906). At least that is so unless the claim of subject matter jurisdiction is "frivolous and not substantial," *United States v. United Mine Workers*, *supra*, 330 U.S. at 293, or the "court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities." *id.* at 309 (Frankfurter, J., concurring).

The *Mine Workers* principle, though usually stated to apply to a court's "jurisdiction to determine its jurisdiction," is really an illustration of a somewhat broader point: In some circumstances the orderly processes of the courts must be observed even if it is subsequently determined by an appellate court that the trial court lacked subject matter jurisdiction. For example, a witness in a civil trial could not disrupt the courtroom and then escape the penalties of criminal contempt by successfully arguing that the court lacked subject matter jurisdiction over the suit between the civil litigants. The proper discharge of the judicial function requires that a court's lack of power to adjudicate the rights of the primary litigants not defeat the court's ability to command the witness to cease his disruption. Compelling a recalcitrant witness to furnish unprivileged evidence is admittedly less vital to the judicial function than maintaining courtroom order, but it is sufficiently integral to that function to justify use of such authority despite lack of jurisdiction to adjudicate rights between primary litigants.

Still, it is arguable that a court's authority to punish courtroom disorder or witness recalcitrance with *criminal*

contempt sanctions does not authorize the imposition of *civil* contempt sanctions without affording the contemnor an opportunity to contest subject matter jurisdiction over the underlying suit. This argument, which seems inconsistent with the normal rule that civil contempt measures must be used before the more drastic sanctions of criminal contempt are employed, *see Shillitani v. United States*, 384 U.S. 364, 371 n.9 (1966), draws some support from the decision in *Mine Workers*. As the Court there observed,

> It does not follow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. The right to remedial relief falls with an injunction which events prove was erroneously issued . . . and *a fortiori* when the injunction or restraining order was beyond the jurisdiction of the court.

330 U.S. at 294-95 (citations and footnote omitted). That rule, however, applies to prevent one party to a lawsuit from profiting at the expense of another party in a suit over which the trial court is ultimately determined to lack subject matter jurisdiction. It does not necessarily apply to bar a plaintiff from retaining a fine imposed upon a witness as a coercive sanction to compel the furnishing of unprivileged evidence. However, we need not decide at this stage of this litigation what rights the plaintiff may ultimately have to any coercive fines the witnesses may pay. *Cf. International Business Machine Corp. v. United States, supra*, 493 F.2d at 119 (raising possibility that a party-contemnor might pay a civil contempt sanction and later make a claim for return of its money). Since the contempt order has been stayed, no such payments have been made, and we prefer

to believe that the witnesses will abide by any orders of the district court once the stay is terminated. We need not speculate about issues that would arise only if recalcitrance continues, coercive fines are paid, and subsequently, on appeal from a final judgment in the underlying action, subject matter jurisdiction is determined to have been lacking.

Even if the witnesses and the federal defendants were correct in urging that *Blair* decided only that a grand jury witness lacks standing to challenge subject matter jurisdiction, that decision nonetheless strongly supports our basic point that a court's lack of subject matter jurisdiction does not disable it from acting in some matters in addition to the ascertainment of its own jurisdiction. Moreover, there are important practical reasons for concluding that the compulsion of unprivileged evidence is one such matter on which the trial court should be free to act, unimpeded by interlocutory appellate inquiry into its subject matter jurisdiction over the underlying litigation. It is well settled that a party may not take an interlocutory appeal from the denial of its motion to dismiss for lack of subject matter jurisdiction. *See Catlin v. United States*, 324 U.S. 229, 233 (1945). If a recalcitrant witness had standing to challenge subject matter jurisdiction on an appeal from an adjudication of civil contempt, the way would be open for easy circumvention of this salutary rule. The defendant could effectively precipitate appellate review of a district court's ruling upholding subject matter jurisdiction by serving a discovery request on a friendly witness, who could obligingly resist solely on the ground that subject matter jurisdiction of the underlying suit was lacking. The witness would realistically be exposed only to the sanction of civil contempt,[2] and would be obliged to pay

[2] Since civil contempt would very likely secure compliance with the discovery order, it would be used prior to any use of criminal contempt. *See Shillitani v. United States, supra*, 384 U.S. at 371

money immediately only if the contempt order was not stayed pending appeal, normally a slight risk and one that the defendant would very likely assume. If the contempt adjudication was affirmed, the witness would promptly comply; if it was reversed for lack of subject matter jurisdiction, the suit would be dismissed. Interlocutory review of the denial of the motion to dismiss would thereby be achieved.

The authorities relied on by the witnesses and the federal defendants to permit their challenge to subject matter jurisdiction are not persuasive. *Bender v. Williamsport Area School District*, 106 S. Ct. 1326 (1986), held that a person not a party to a lawsuit could not appeal from a decision in the suit with which he disagreed. That holding does not help the witnesses who are seeking to challenge a ruling in the lawsuit between the plaintiffs and the federal defendants, to which they are not parties. In *Bender* the Court noted the traditional rule that on every appeal a court is obliged to consider the question of its own jurisdiction and that of the court from which the appeal is taken " 'without respect to the relation of the parties to [such question].' " *Id.* at 1334 (*quoting Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 382 (1884). If we were reviewing a final judgment in the underlying suit, we would of course be obliged to consider the District Court's jurisdiction to enter that judgment, whether or not any party to the suit raised the issue. But *Bender* does not determine whether an appeal from an adjudication of a witness's civil contempt obliges or even permits a reviewing court to consider the trial court's jurisdiction over the underlying lawsuit. In the pending case, we will observe the traditional rule expressed in *Bender* by inquiring only whether the District Court had sufficient jurisdic-

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n.9. *Cf. Marrese v. American Academy of Orthopaedic Surgeons, supra*, 726 F.2d at 1158 (criminal contempt, though rarely imposed as sanction for violation of discovery order, imposed on a party).

tion to enable it to adjudicate the witnesses in civil contempt.

Marrese v. American Academy of Orthopaedic Surgeons, supra, involved a civil defendant held in criminal contempt for failure to obey a discovery order. The defendant resisted on the ground that the action against it was barred by *res judicata*. The Seventh Circuit agreed and ordered the suit dismissed, a ruling subsequently reversed by the Supreme Court, 470 U.S. 373 (1985). In a passage not affected by the Supreme Court's reversal, the Seventh Circuit observed that "if it turns out that [a] lawsuit should not have been pending because it was barred at the outset by res judicata we think it follows logically and practically that the discovery order exceeded the judge's authority." 726 F.2d at 1158. That passage may well be correct with respect to discovery directed against a party, a point we need not resolve on this appeal. It is surely correct with respect to discovery directed at a party that is resisted on the ground that the court lacks subject matter jurisdiction over the lawsuit involving the party. *See United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950). We do not think it correct, however, with respect to discovery directed at a witness. However that may be, the most pertinent aspect of the Seventh Circuit decision cuts decisively against the position of the witnesses on this appeal. Judge Posner was careful to point out that the defendant-contemnor could not secure interlocutory review of the denial of its motion to dismiss on *res judicata* grounds by the simple expedient of resisting discovery and raising the *res judicata* point on appeal from an adjudication of contempt. Review of the *res judicata* ruling was not permitted in the appeal from the contempt judgment but was permitted only in the "independent appeal" resulting from the District Court's certification of its *res judicata* ruling for interlocutory review pursuant to 28 U.S.C. § 1292(b). *See Marrese v. American Academy of Orthopaedic Surgeons, supra*, 726 F.2d at

1158. Thus, a holding of *Marrese*, not disturbed by the Supreme Court's reversal on the merits of the *res judicata* issue, is that a defendant-contemnor appealing from a contempt adjudication for refusing to comply with discovery orders may not challenge a ruling of the trial court that, if correctly made, would end the civil suit in which the discovery was ordered.

United States v. Thompson, supra, concerned adjudication of civil contempt against an American citizen who failed to comply with a grand jury subpoena issued by the District Court for the Southern District of New York and served on the witness in the Philippines. We upheld the witness's contention that service of a grand jury subpoena abroad was not authorized by 28 U.S.C. § 1783 as it existed in 1962 when the subpoena was served. Because personal jurisdiction was not validly obtained, the witness was not obligated to comply with the subpoena, and the contempt was therefore reversed. The case stands as an instructive contrast to *United States v. Blair, supra*. Thompson was allowed to raise on appeal an issue personal to him, the lack of lawful service of process. Blair was not allowed to challenge an issue in which he was "not interested," *United States v. Blair, supra*, 250 U.S. at 279, the subject matter jurisdiction of the district court and the grand jury over the matter being investigated by the grand jury.

We conclude that the witnesses in the instant case may challenge their contempt adjudication only on the limited ground that the District Court lacks even colorable jurisdiction over the underlying lawsuit. An order of a court that is "usurping judicial forms and facilities," *Mine Workers, supra*, 330 U.S. at 309 (Frankfurter, J., concurring), need not be obeyed. But if such colorable jurisdiction exists, a witness may not challenge plaintiffs' standing in the underlying action or raise other issues that might demonstrate that the District Court has erroneously exercised subject matter jurisdiction over that

action. This distinction between an erroneous assertion of subject matter jurisdiction and a clear usurpation of judicial power has been fully developed in cases considering the availability of a collateral attack on a judgment entered after litigation of subject matter jurisdiction. *See Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) (collecting cases); *Restatement (Second) of Judgments* § 12(1) (1980). Collateral attack is available only if the assertion of subject matter jurisdiction was without colorable basis, not merely erroneous.

In the instant case, though the issue of subject matter jurisdiction over the underlying lawsuit is a substantial question, the District Court cannot be said to be usurping power in determining that subject matter jurisdiction exists. Plainiffs' suit is more than a citizen effort to have the tax laws enforced and more than a taxpayer effort to complain of tax exemptions of others that might violate the Establishment Clause. The plaintiffs have claimed direct, personal injury arising from the fact that the federal defendants' failure to enforce the political action limitations of section 501(c)(3) has placed the plaintiffs at a competitive disadvantage with the Catholic Church in the arena of public advocacy on important public issues. That is a substantial basis on which to predicate standing.[3] We need determine no more than

[3] *Cf. Clarke v. Securities Industry Ass'n*, 107 S. Ct. 750, 754-59 (1987) (competitor suffers injury in fact from agency action permitting another to undertake certain activities and has standing if competitor's interest is arguably within the zone of interests protected by the statutory provision or constitutional guarantee allegedly violated, *i.e.*, if competitor alleges "an injury that implicates the policies" of such provision or guarantee) (citing, *inter alia, Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970)); *Baker v. Carr*, 397 U.S. 186, 206-08 (1962) (plaintiffs as voters had standing to challenge act that created "position of constitutionally unjustifiable inequality *vis-a-vis* [other] voters" and thereby disadvantaged and impaired plaintiffs' votes); *see generally Heckler v. Chaney*, 470 U.S. 821, 833 n.4, 838 (1985) (leaving open whether agency non-enforcement

that to conclude that the District Court had at least a colorable basis for the exercise of subject matter jurisdiction over the plaintiffs' suit.

The judgment of the District Court is affirmed.

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decision would be subject to judicial review if it was "so extreme as to amount to an abdication of statutory responsibilities" or violated constitutional rights); *id.* at 839 (Brennan, J., concurring).

CARDAMONE, *Circuit Judge*, Dissenting:

The United States Catholic Conference and the National Conference of Catholic Bishops, (collectively "the witnesses"), seek to overturn a civil contempt order issued against them for their refusal to obey a discovery order. The witnesses—who are not parties to the underlying action below—maintain that the district court may not properly compel their production of over 20,000 pages of documents because it lacks subject matter jurisdiction over the underlying controversy. In response, the majority for the first time holds that a non-party witness may not successfully challenge subject matter jurisdiction, except where the district court lacks "colorable" jurisdiction over the underlying action. Its rationale appears to be that non-party witnesses have no "personal" interest in the court's authority or lack of authority to adjudicate the matter before it. The legal question is whether non-party witnesses held in civil contempt may presently challenge the subject matter jurisdiction of the district court over the underlying action. The majority says "not now". But because this challenge has no tomorrow the law holds that it must be made "now or never".

Since a federal court's power to issue discovery and civil contempt orders derives from and necessarily depends on its jurisdictional power to hear the underlying action before it, I would hold that these witnesses are entitled on this appeal to challenge the district court's subject matter jurisdiction and respectfully dissent from the majority's contrary holding.

A. The Court's Power to Issue Discovery and Contempt Orders Derives from its Subject Matter Jurisdiction Over the Underlying Action

Article III courts have jurisdiction only to hear "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1; *Allen v. Wright*, 468 U.S. 737, 750 (1984). With few

exceptions, exercises of judicial power by Article III courts must derive from this constitutional grant. Actions taken in excess of those powers are null and void because actions taken without such jurisdiction are an "usurp[ation of] judicial forms and facilities", *United States v. United Mine Workers*, 330 U.S. 258, 309 (1947) (Frankfurter, J., concurring). These rules apply with equal force to civil contempt proceedings. It has been established law for over 100 years that a district court must have subject matter jurisdiction over the suit before it may issue a valid contempt order. *See, e.g., Ex parte Rowland*, 104 U.S. 604, 612 (1881). When it acts in excess of its jurisdiction, the order punishing a person for contempt is void. *Id.* at 612, 617-18; *see also In re Burrus*, 136 U.S. 586, 597 (1890); *In re Sawyer*, 124 U.S. 200, 221-22 (1888); *Ex parte Fisk*, 113 U.S. 713, 726 (1885).

The seminal decision in *United Mine Workers* demonstrates that these constitutional mandates continue to control civil contempt. In that case, the United States sued to restrain a coal strike in a mine seized earlier by the government. The district court issued a temporary restraining order to preserve the *status quo*. When the mine workers struck, they were held in contempt. Affirming the criminal contempt conviction, the Supreme Court held that district court orders must be obeyed until set aside, even when it ultimately is determined that the district court was deprived by statute of the jurisdiction necessary to issue the order. 330 U.S. at 293:

In so holding, the Court noted two important distinctions relevant to the issue before us. First, while the contempt order's validity does not depend on the ultimate constitutionality of the statute under which is issued, it must nevertheless be issued by a court with jurisdiction over the subject matter of the underlying litigation:

> [W]e find impressive authority for the proposition that an order issued by a court *with jurisdiction*

> *over the subject matter* and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.

Id. (footnote omitted and emphasis added). Insistence on a duty of obedience to a court order is therefore appropriate only when the "subject matter of the suit, as well as the parties, are properly before the court." *Id.* at 294.

Second, and most importantly, the Supreme Court stated that a civil contempt order—like the one on this appeal—would not survive a reversal for lack of subject matter jurisdiction:

> It does not folow, of course, that simply because a defendant may be punished for criminal contempt for disobedience of an order later set aside on appeal, that the plaintiff in the action may profit by way of a fine imposed in a simultaneous proceeding for civil contempt based upon a violation of the same order. *The right to remedial relief falls* with an injunction which events prove was erroneously issued, . . . and *a fortiori when the injunction* or restraining order *was beyond the jurisdiction* of *the court.*

Id. at 294-95 (emphasis added). The Supreme Court then went on to state that, despite its' affirmance of the criminal contempt conviction, it would nevertheless set aside the civil contempt judgment. *Id.* at 295. Thus, this holding teaches lower courts that their power to issue a civil contempt order derives from and depends upon their subject matter jurisdiction over the underlying action. *See also In re Marc Rich & Co.*, 707 F.2d 663, 669 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983) ("A federal court's jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction.")

After *United Mine Workers*, the Supreme Court in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950),

specifically addressed the derivative nature of evidentiary subpoenas. *Morton Salt* stated that a court's ability to summon evidence is dependent on its having subject matter jurisdiction over the action before it. The Court compared the subpoena power of administrative agencies with the judicial subpoena power, and noted that "[t]he judicial subpoena power . . . is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution." *Id.* at 642. While "judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation," administrative agencies have "a power of inquisition . . . which is not derived from the judicial function. It is more analogous to the Grand Jury, *which does not depend on a case or controversy for power to get evidence . . . .*" *Id.* (emphasis added). In the colorful words of Justice Jackson, "[t]he courts could not go fishing . . . ." *Id.*

A recent Seventh Circuit case forcefully illustrates the point. In *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150 (7th Cir. 1984) (en banc), *rev'd on other grounds*, 470 U.S. 373 (1985), a civil defendant was held in contempt for disobeying a discovery order. The defendant resisted the order on the ground that the underlying lawsuit was barred by *res judicata*. The Seventh Circuit agreed but was later reversed by the Supreme Court. In a holding unaffected by the reversal, the Seventh Circuit discussed the scope of review on appeal from a contempt order. It concluded that an appeal from a contempt order brings up for appellate review the validity of the discovery order.

> If a party is willing to pay the price of being punished for contempt (or suffering an equivalent sanction such as dismissal of the complaint) if the validity of the order he has disobeyed is ultimately upheld, he can get immediate review of that order by appealing from the contempt judgment . . . . If the underlying order is invalidated, the contempt judgment falls with it.

726 F.2d at 1157. Having determined that the discovery order's validity was properly before it, the Seventh Circuit then addressed whether the discovery order was invalid because the suit itself should have been barred by *res judicata* stating

> [W]e believe that the discovery order does fall with the underlying suit. You cannot (with exceptions not pertinent here) get discovery in the federal courts unless you have a pending lawsuit, and if it turns out that the lawsuit should not have been pending because it was barred at the outset by res judicata we think it follows logically and practically that the discovery order exceeded the judge's authority.
>
> And, as we have noted, if the order is invalid the contempt judgment must be set aside.

Id. at 1158.

Thus, under *Marrese*, plaintiffs have no right to obtain discovery unless there is a pending lawsuit. If it is determined that the lawsuit should not have been pending because the district court lacked subject matter jurisdiction, then the discovery order falls because it exceeds the district court's jurisdiction. And, if the discovery order exceeds the judge's authority, the contempt judgment for its disobedience must *a fortiori* be vacated.

The majority implicitly recognizes the derivative nature of the district court's contempt powers when it concludes that the lower court must have at least "colorable" jurisdiction over the case before it may constitutionally issue binding orders. It accepts the proposition that the district court's power to issue a contempt order depends, at least in part, on its subject matter jurisdiction over the underlying action. Nevertheless, the majority rejects

the application of the derivative argument to this case on the ground that the contemnors in *United Mine Workers* and *Marrese* were parties. Instead it suggests that the rule of *United Mine Workers* "does not necessarily" apply when the contemnor is a non-party witness.

The flaw in this distinction between party and non-party contemnors is threefold. First, while the Supreme Court did state that the *plaintiff*, i.e. a party, to the action may not profit from an erroneously issued order, it did not indicate—much less hold—that the payor-contemnor must also be a party. 330 U.S. at 295. Second, the distinction seems contrary to the fundamental principle that a plaintiff's right to monetary relief "is dependent upon the outcome of the basic controversy." *Id.* at 304. A plaintiff's right to collect a fine for a civil contempt falls with the determination that the issuing court lacked subject matter jurisdiction. *Id.* at 294-95. It seems unreasonable to suggest that this rule loses force when the indicated payor-contemnor is a non-party. Finally, the distinction simply ignores the fact that disobeying and risking contempt was the only avenue available for the witnesses to obtain appellate review of the discovery order. *See United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *Marrese*, 726 F.2d at 1158. In fact, the majority's reluctance to decide whether the witnesses would be entitled to a refund of any fines should subject matter jurisdiction ultimately be found lacking, reveals its own dissatisfaction with the party/non-party distinction.

The majority also raises a separate objection with respect to *Marrese*'s application here. It correctly points out that the Seventh Circuit did not review the *res judicata* determination as part of its review of the appeal from the contempt judgment, but on review of an independent appeal taken pursuant to 28 U.S.C. § 1292(b). *See* 726 F.2d at 1158. Consequently, it views *Marrese* as prohibiting, on appeal from a contempt judgment, appellate review of a trial court ruling whose determination may be dispositive of the underlying litigation.

This analysis overlooks the Seventh Circuit's rationale. That court correctly noted that no one can obtain appellate review of the merits of his contention without waiting for a final judgment to be entered or an interlocutory appeal to be certified under § 1292(b). *Id.* Since the contemnor in *Marrese* was a *party*—who could raise the *res judicata* issue on an appeal from a final judgment in the underlying action—the court did not want to allow the defendant to circumvent the final judgment rule by obtaining a substantive review of his claim on appeal from the contempt judgment. Thus, the court was careful to point out that it was reviewing the *res judicata* issue on the certified appeal only. *Id.*

Yet, unlike the contemnor in *Marrese*, the witnesses here are not parties and hence do not have the right to appeal from the ultimate judgment in the underlying lawsuit. *See Union of Professional Airmen v. Alaska Aeronautical Indus.*, 625 F.2d 881, 884 (9th Cir. 1980). Thus, allowing these witnesses to obtain immediate appellate review does not subvert the final judgment rule since any claims they have must be asserted now—on appeal from their contempt sanction—or be forever lost. In short, the majority's discussion of *Marrese* ignores its own admission that "a witness has appellate rights superior to those of a party."

To summarize, both traditional constitutional principles and case law make clear that a district court's power to issue discovery and civil contempt sanctions derives from and is limited by its power over the lawsuit. If subject matter jurisdiction over the action is lacking, then the district court equally lacks authority to hold these witnesses in civil contempt. With this conclusion in mind, I turn now to an analysis of the witnesses' right

to challenge the district court's subject matter jurisdiction under the standing doctrine.

B. Non-Party Witnesses Must Have Standing to Challenge the District Court's Subject Matter Jurisdiction

The first and easier part of the standing question is whether the contempt order is appealable. Non-party witnesses are entitled to appeal a contempt order without waiting for final judgment to be entered in the underlying action, *see, e.g., Ryan*, 402 U.S. at 532; *Cobbledick v. United States*, 309 U.S. 323, 327 (1940); *Alexander v. United States*, 201 U.S. 117, 121 (1906), because insofar as the witness is concerned the cause has then become personal and final as to him. *Cobbledick*, 309 U.S. at 327. A party, as distinct from the non-party witness, has no right to appeal a contempt order until final judgment is entered in the underlying lawsuit. *See IBM Corp. v. United States*, 493 F.2d 112, 115 & n.1 (2d Cir. 1973). The majority concedes that the present contemnor order is a final judgment from which the witnesses may immediately appeal.

The second and more difficult question—and the focus of this appeal—is what may properly be reviewed on that appeal. The majority agrees that if "the absence of subject matter jurisdiction over the underlying suit would preclude the District Court from ordering a witness to produce evidence and effecting compliance," then the witnesses "would have standing to assert such a claim on appeal from an adjudication of contempt." Since a district court's civil contempt powers do depend on its underlying subject matter jurisdiction, as demonstrated above, these witnesses have standing to object to the district court's jurisdictional ruling. Despite its concession, the majority refuses to permit the witnesses to raise on appeal the only claim which, were they to succeed, would

grant them effective relief. In my view this position is plainly contrary to standing doctrine principles.

Article III requires the party invoking the court's authority to demonstrate an actual or threatened injury resulting from and fairly traceable to the alleged illegal conduct. That injury must also be likely to be redressed by the relief requested. *See Allen v. Wright*, 468 U.S. at 751; *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

Under these principles, the witnesses clearly have standing to challenge the district court's subject matter jurisdiction. They face an actual or threatened injury. As the Supreme Court recognized in *Maness v. Meyers*, 419 U.S. 449 (1975), when a trial court orders a witness to reveal information, "[c]ompliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing error." *Id.* at 460; *see also Ryan*, 402 U.S. at 532 ("Of course, if he [the potential contemnor] complies with the subpoena he will not thereafter be able to undo the substantial effort he has exerted in order to comply"); *Overby v. United States Fidelity and Guaranty Co.*, 224 F.2d 158, 162 (5th Cir. 1955) (a non-party witness "asserting a continuing right of control of, and property right in, the documents, has standing" to appeal the district court's denial of his claim of evidentiary privilege).

This injury to the witnesses also satisfies the other standing requirements. First, it occurs as a result of allegedly illegal—or in this case unconstitutional—conduct. If, as the witnesses contend, the district court issued a discovery order without having subject matter jurisdiction over the lawsuit, then the district court exceeded the jurisdictional limits of Article III. Second,

the injury is fairly traceable to the challenged action for it is the discovery order itself, the witnesses maintain, that threatens them with irreparable harm and chills their First Amendment rights. If the discovery order is upheld, but *later* determined to be beyond the district court's powers, then the witnesses will have been needlessly subjected to expensive, burdensome, and potentially prejudicial discovery. Obviously then, full and effective appellate review conducted *before* compliance must include an examination into the district court's jurisdiction.

Finally, the injury is "likely" to be redressed by a favorable decision of this Court. If we were to determine, as the witnesses urge, that the district court lacks subject matter jurisdiction over the lawsuit, then obviously the offending discovery order would be set aside. Accordingly, I would hold that the witnesses have standing on this appeal to challenge jurisdiction.

C. We have a *Sua Sponte* Duty to Review the Lower Court's Subject Matter Jurisdiction

Wholly apart from the witnesses' standing, we have an independent and affirmative duty to review the lower court's authority. As the Supreme Court has recently explained, this duty derives not from a mere procedural convenience, but from the Constitution itself.

> Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review" . . .

Bender v. Williamsport Area School Dist., 106 S.Ct. 1326, 1331 (1986) (emphasis added) (quoting *Mitchell*

v. Maurer, 293 U.S. 237, 244 (1934)). The Court continued by saying that this rule which is derived "'from the nature and limits of the judicial power of the United States, is inflexible and without exception.'" *Id.* at 1334 (quoting *Mansfield C. & L.M.R. Co.* v. Swan, 111 U.S. 379, 382 (1884)). And significantly it further stated that: "'On *every* writ of error or appeal, the first and fundamental question is that of jurisdiction . . . of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and *without respect to the relation of the parties* to it.'" *Id.* (emphasis added) (quoting *Mansfield*, 111 U.S. at 382). *See also In re Appointment of Independent Counsel*, 766 F.2d 70, 73 (2d Cir. 1985) ("Since the standing requirement is derived from Article III limitations on the federal court's powers, it is the threshold issue in every case.").

My colleagues admit that we are obliged to consider the district court's jurisdiction to enter a final judgment in the underlying suit, whether or not the issue is raised by a party, but fail to recognize that on this appeal there is, of course, a *final* judgment before us. *See Shuffler v. Heritage Bank*, 720 F.2d 1141 (9th Cir. 1983). In fact, we have not hesitated to examine *sua sponte* a district court's jurisdiction on appeal from a civil contempt order. *See, e.g., Manway Construction Co. v. Housing Authority of Hartford*, 711 F.2d 501 (2d Cir. (1983);[1] *see also Motorola, Inc. v. Computer Displays International, Inc.*, 739 F.2d 1149, 1153-54 (7th Cir. 1984); *In re Grand Jury Proceedings—Gordon, Witness*, 722 F.2d 303, 305-06 & n.1 (6th Cir. 1983), *cert. denied*, 467 U.S. 1246 (1984). Since we have a *sua sponte* duty to review the

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[1] The fact that we vacated the civil contempt order in *Manway* after having found no subject matter jurisdiction further supports our conclusion that a district court's discovery and contempt powers are limited by its actual, and not just colorable, subject matter jurisdiction.

jurisdiction of the district court and since, as discussed above, the jurisdiction of the district court to issue civil contempt judgments derives from its jurisdiction in the underlying case, we have a *sua sponte* duty to decide whether the district court has jurisdiction over the underlying case.

II

The majority's holding that non-party witnesses have no standing to challenge the subject matter jurisdiction of the underlying action has several flaws. First, and most importantly, it deprives these witnesses of any opportunity to raise a claim that might entitle them to relief. Second, it relies on an unwarranted extension of a single Supreme Court precedent. Third, it dangerously expands the limited exception under which a court may take action without a case or controversy before it. Fourth, it creates an unsupportable distinction between personal and non-personal claims. Finally, it is needlessly concerned with the possibility of collusion.

A. The Majority Denies the Witness Any Opportunity for Appellate Review

The majority concedes that the witnesses' contempt fines might be returned if the underlying action is eventually dismissed for want of subject matter jurisdiction. Nevertheless, it refuses to hear this claim at the only point at which the witnesses have a right to appeal. The holding assumes that the parties or the court will raise the subject matter jurisdiction issue on appeal from the underlying action. Yet an appeal from the ultimate decision is an uncertainty. Further, even if there is an appeal, the witnesses as non-parties, would not be entitled to assert the claim during that appeal.

Even if the witnesses could be assured of appellate review at the close of the underlying action, such a delay would present the witnesses with a Hobson's choice: either comply with a discovery order they find objectionable and thus suffer the very mischief they seek to avoid or be at risk for the enormous fines imposed by the district court. The majority blithely assumes that the witnesses must abandon their claim "prefer[ing] to believe that the witnesses will abide by any orders of the district court once the stay is terminated." But the law does not require such blind obedience. In *United States v. Ryan*, the Supreme Court stated that "respondent is free to refuse compliance and, as we have noted, in such event he may obtain *full review* of his claims *before* undertaking any burden of compliance with the subpoena." 402 U.S. at 532 (emphasis added). In *Cobbledick*, the Court noted that once a witness chooses to disobey a court order and is "committed for contempt . . . . [a]t that point the witness's situation becomes so severed from the main proceeding as to permit an appeal . . . . [N]ot to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail." 309 U.S. at 328.

The relevance of *Ryan* and *Cobbledick* to the instant case is obvious. These witnesses must be allowed on this appeal to raise their only challenge to the trial court's order before being compelled to comply with its dictates. Under today's holding, being held in contempt becomes not a choice, but a certainty. Absent the opportunity for full and effective review, a right to appeal after subjecting oneself to contempt is worthless. Thus, a witness will in circumstances similar to those here refuse to hazard contempt leaving compliance as the only option. To emasculate the witnesses' right to appeal by so narrow a view of what an appellate court may review, effectively deprives these contemnors of any meaningful appeal.

Further, such a limited view of an appeal is contrary to case law. In *Cobbledick*, the Supreme Court stated that, "[d]ue regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statute." 309 U.S. at 329.

This concept was reiterated just over a month ago in *Pennsylvania v. Ritchie*, —— U.S. ——, 107 S. Ct. 989 (1987), when the Supreme Court said that " 'statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.' " *Id.* at 997-98 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976)). A narrow review of the non-party witness' claims accomplishes precisely what *Ritchie* said lower courts should attempt to avoid.

B. The Majority's Reliance on *Blair* is Misplaced

The majority relies on *Blair v. United States*, 250 U.S. 273 (1919), as the "most pertinent authority" to resolve the issue before us. While *Blair* contains broad language suggesting that witnesses do not have standing to challenge a grand jury's or a court's jurisdiction, that language must be read in the context of the surrounding text. To begin, the specific holding in *Blair* is that a grand jury witness may not challenge the constitutionality of the statute under which the investigated conduct may be illegal. *Id.* at 279. This is because, as *Blair* makes clear, the jurisdiction of the grand jury is not dependent upon the constitutionality of the statutes which prohibit the conduct being investigated. Thus, a declaration that the statute in *Blair* was unconstitutional would not give the witness the relief he sought. In this respect, *Blair* represents an ordinary application of the standing doctrine inapplicable in this case. Here, unlike *Blair*, the jurisdiction of the court to issue a contempt order *is derivative* of its jurisdiction over the underlying action. Thus, unlike a grand jury witness these court-ordered witnesses do have an interest in the district court's proper exercise of its authority.

Moreover, to the extent that *Blair* could be read broadly to prevent a witness-contemnor from challenging the subject matter jurisdiction of the grand jury on any

grounds, *Blair* should not be extended to the courts.[2] It is clear that *Blair* relied on the investigative nature of the grand jury, as distinguished from Article III courts that are limited by the Constitution to deciding cases and controversies. As *Blair* stresses, the grand jury is "a body with powers of investigation and inquisition, the scope of those inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation." *Id.* at 282. The Supreme Court has noted this distinction when relying on *Blair* in the context of an administrative agency investigation. *See, e.g., United States v. Bisceglia*, 420 U.S. 141, 147-48 (1975) (federal agencies have "a power of inquisition" which is "more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence").

For this reason, we have recognized the rationale of *Blair* as relying on the broad investigative powers of the grand jury. *See, e.g., United States v. Flood*, 394 F.2d 139, 141 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968). In fact, though we and other federal courts have relied on *Blair* in a great variety of grand jury and federal agency cases,[3] it has never been applied as the majority

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[2] While *Blair* refers to both the grand jury and the courts it is clear that it does so only because the grand jury issues its subpoenas in the court's name. For that reason, any indirect attack on the court in *Blair* was a result of the direct attack on the grand jury's investigative powers under the statute. Hence, the Supreme Court only mentioned the court's powers to the extent that the grand jury took action in its name.

[3] *See, e.g., United States v. Sells Engineering Inc.*, 463 U.S. 418, 423 (1983) (regarding disclosure of grand jury materials); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 252 n.7 (1983) (regarding grand jury testimony); *United States v. Bisceglia*, 420 U.S. 141, 147 (1975) (IRS Summons); *In re Grand Jury Matters*, 751 F.2d 13, 17 (1st Cir. 1984) (appeal involving attorney's refusal to testify

does here. For these reasons, reliance on *Blair* in the present context is misplaced.

C. The Trouble With "Colorable"

Again relying on *Blair*, the majority determines that a non-party witness may challenge only the "colorable" jurisdiction of the lower court. There are several problems with allowing the witnesses to attack the district court's "colorable", but not "actual", subject matter jurisdiction. First, the rule from which the majority extrapolates the "colorable"/"actual" distinction was not meant to apply in this context. There are only three instances when a district court's action is *not* limited by its jurisdictional power: (1) a court has power to determine its jurisdiction; (2) that same court has power to issue an injunction to preserve the *status quo* pending

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before grand jury); *In re Subpoenas to Local 478, I.U.O.E. & Benefit Funds*, 708 F.2d 65, 70-72 (2d Cir. 1983) (appeal from denial of motions challenging a special grand jury investigation); *In re President's Commission on Organized Crime Subpoena of Scarfo*, 783 F.2d 370, 372 (3d Cir. 1986) (motion to quash subpoena to appear before presidential commission); *United States v. (Under Seal)*, 714 F.2d 347, 350 n.9 (4th Cir.) (appeal from order quashing grand jury subpoena), *cert. denied*, 464 U.S. 978 (1983); *Federal Election Commission v. Lance*, 617 F.2d 365, 369 (5th Cir. 1980) (en banc) (administrative subpoena enforcement proceeding), *cert. denied*, 453 U.S. 917 (1981); *In re Grand Jury Subpoena (Battle)*, 748 F.2d 327, 330 (6th Cir. 1984) (appeal from order quashing in part grand jury subpoena); *In re Bank*, 527 F.2d 120, 125 (7th Cir. 1975) (appeal from contempt order for refusal to testify before grand jury); *In re Grand Jury Proceedings*, 473 F.2d 840, 844 (8th Cir. 1973) (appeal from contempt order for refusal to testify before grand jury); *In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1190 (9th Cir. 1981) (appeal from disclosure of grand jury material), *aff'd*, 463 U.S. 418 (1983); *United States v. DiBernardo*, 775 F.2d 1470, 1477 (11th Cir. 1985) (appeal from order dismissing indictment based on errors committed during grand jury proceeding), *cert. denied*, 106 S. Ct. 1948 (1986); *United States v. Coachman*, 752 F.2d 685, 691 n.34 (D.C. Cir. 1985) (appeal from contempt order for refusal to testify before grand jury).

its jurisdictional determination, *see United States v. Shipp*, 203 U.S. 563, 573 (1906) (Holmes, J.); and (3) it may enforce that injunction through criminal contempt sanctions. *See United Mine Workers*, 330 U.S. at 293. From these three precisely defined rules the majority creates out of thin air an unprecedented fourth: a court without actual subject matter jurisdiction may issue a discovery order and adjudicate a civil contempt for its violation. Why create this rule? One may search in vain the whole body of the law for a good reason.

The very existence of a court presupposes its power to entertain a controversy, if only to decide that it has no power over the particular action. Thus, a court must have "jurisdiction to determine its jurisdiction" or be faced with the paradox of lacking power to decide its power.[4] Similarly, a court must be able to preserve the *status quo* pending its jurisdictional determination or its ultimate decision might be rendered moot. And, finally, a court must be able to enforce its authority by contempt. Without coercive power over the parties before it, a court could not dispose of cases and controversies. Justice could not be fairly administered were persons left pending adjudication free to engage in conduct that might immediately interrupt the judicial proceedings or so change the *status quo* that no effective judgment could later be rendered. The common link that ties these three exceptions together is the preservation of the court's ability to function and its authority to determine its jurisdiction.

This link is missing in the civil contempt context. For, unlike "sentences for criminal contempt [which]

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[4] The concurring opinion suggests that "jurisdiction to determine jurisdiction" may include jurisdiction to compel discovery where the jurisdictional inquiry depends on factual findings. But in most cases, including this one, such an inquiry is unnecessary because a court must accept the plaintiff's factual allegations as true when ruling on a motion to dismiss for want of standing. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975).

are punitive in their nature and [which] are imposed for the purpose of vindicating the authority of the court," *United Mine Workers*, 330 U.S. at 302, civil contempt is designed to coerce compliance for the benefit of an opposing party. *United States v. Russotti*, 746 F.2d 945, 949 (2d Cir. 1984) (civil contempt is "a remedy available only for the benefit of parties" whereas "[v]indication of the court's authority is normally accomplished by criminal contempt"); 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3917 at 616 (1976). Unlike jurisdiction, a discovery order—which the majority concedes is "less vital to the judicial function"—is for the convenience of the parties. Consequently, while a discovery order and its enforcement through civil contempt sanctions may protect the orderly process of the lawsuit relative to the parties, it does not safeguard the court's ability to function. *See Marrese*, 726 F.2d at 1158.

Nevertheless, the majority views the discovery order as "sufficiently integral" to the judicial function to justify its issuance by a court without jurisdiction. This concept seems contrary to constitutional notions of jurisdiction. For example, is not personal jurisdiction equally "sufficiently integral to the judicial function"? Then, would not a district court be justified in issuing a discovery order without "actual" personal jurisdiction over the witnesses? Yet, the majority would allow the witnesses to challenge on this appeal the district court's lack of personal jurisdiction. In light of these inconsistencies, the decision to add a new exception to the three existing exceptions seems ill-advised.

The second problem with the use of the "colorable" jurisdiction standard is that it lacks a definition. Must a district court have "*de facto* existence and organization" as those terms are used in *Blair*? *See* 250 U.S. at 282. Or, has the majority adopted the test of a "clear usurpation of power" used for a writ of mandamus?

If used in the latter sense, then the denial of the writ—which has already occurred in this case—would terminate review, and a subsequent appeal from contempt, as this, would be meaningless. In any event, without a clear definition, the use of the term "colorable" does not lend itself to principled analysis.

Finally, the refusal to allow a challenge to actual subject matter jurisdiction is inconsistent with the holding that the witnesses may attack the district court's "colorable" jurisdiction. If subject matter jurisdiction may be raised on appeal even a little—just to see if it is "colorable"—it is therefore a reviewable matter and the question is no longer "whether" it may be raised by the witnesses, but "how much" they may raise it. Hence, the majority's holding that our review be limited to ascertaining "colorable" jurisdiction appears untenable once it concedes that the jurisdictional issue may be raised at all.

D. The Problem with "Personal"

Again, building on *Blair*, the majority adds a further limitation on the scope of our review on this appeal by stating that the witnesses may contest only "personal" matters. It then concludes that subject matter jurisdiction over the underlying lawsuit is not "personal" to the witnesses. At the same time, it concedes that the witnesses are entitled to challenge the district court's "colorable" jurisdiction. Under this rationale, "colorable" jurisdiction must therefore be "personal" to the non-party wtinesses. No explanation is offered as to why "colorable" jurisdiction is personal to the witness while "actual" jurisdiction is not.

Further, it implies that the district court's "actual" subject matter jurisdiction would be "personal" to a party, apparently based on the belief that a party is better suited to raise this claim. Yet the prerequisite for standing is that a person be among the injured, not that

such person be the most grievously or directly injured. *See Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974); *see also Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (party seeking review must be "among the injured"). Moreover, like a witness, a party cannot waive, confer, or prevent a court's *sua sponte* review of subject matter jurisdiction. *See, e.g., Reale International v. Federal Republic of Nigeria*, 647 F.2d 330, 331 (2d Cir. 1981). Hence, "actual" subject matter jurisdiction is no more "personal" to a party than it is to a witness. This difficulty merely points up the number of unanswered questions left by the "personal-non-personal" distinction. For example, what is the criteria for a "personal" claim? Must a contemnor now show a threshold requirement that the grounds upon which he challenges the order affect his "personal" rather than "non-personal" interests?

E. The Majority's Fear of Collusion

The final reason for a holding adopting a narrow rule of review is the fear of collusion between a party and the non-party witness. Yet, before these fears could be realized, a party would have to overcome several obstacles. It would have to find a friendly witness to subpoena; that witness must also be willing to risk being cited for contempt with the possibility of a fine or imprisonment or to gamble that the contempt order will be stayed pending appeal. Apart from these hurdles, there are other risks that the conspirators and their attorneys would be taking that are not analyzed in the majority's account. If the other party to the lawsuit got wind of such a scheme, he could bring it to the court's attention thereby subjecting the colluders to sanctions and their attorneys to possible disbarment. *See Code of Professional Responsibility* Canon 7, EC7-25, EC7-26. In any event, weighing the risk of collusion against the loss of a non-party witness' right to a full and effective appeal, it seems preferable to me to chance the former in order to preserve the latter.

III

For all the above reasons, I dissent and vote to review on this appeal the merits of the witnesses' claim that they may not properly be held in contempt because the district court lacked subject matter jurisdiction over the underlying lawsuit between plaintiffs and the government defendants.

KEARSE, *Circuit Judge*, concurring:

I concur in Judge Newman's thorough opinion, but write separately to emphasize what I view as the narrow scope of the issue presented on this appeal and to add a reason for rejecting the appeal.

Though both the majority and dissenting opinions discuss a witness's standing to challenge the court's subject matter jurisdiction of the litigation, the question of subject matter jurisdiction may have many ingredients; this appeal involves only the ingredient of the plaintiffs' standing to bring the litigation. While certain other ingredients of subject matter jurisdiction, such as the existence of a federal question or the grant by Congress to the federal courts of the power to adjudicate a particular question, may be determined principally by legal analysis, the question of plaintiff's standing to sue often turns on his ability to make showings that are largely factual, *see, e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109-15 & nn.29, 31 (1979); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-77 (1978); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-90 & n.15 (1973). For example, he must demonstrate that there is actual or threatened injury, that such injury is fairly traceable to defendant's illegal conduct, and that there is a substantial likelihood that such injury will be redressed by the relief requested. *See, e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984). To make such largely factual showings, a plaintiff may well need, as in this case, to obtain discovery from a non-party witness.

We all agree that the court has jurisdiction, or power, to determine whether or not it has subject matter jurisdiction. One purpose of recognizing this power is to permit informed, reliable decisions on the jurisdictional issue of the plaintiff's standing. Where the needed showing as to standing is largely factual, the court must have the

power to permit the plaintiffs to conduct a reasonable amount of discovery, if necessary, to prove to the court that they do have standing. Where there is at least a colorable basis for standing, it would be unsound to allow the witnesses to abort discovery relating to standing by arguing that the plaintiffs have no actual standing.

Thus, to the extent that the discovery sought in the present case seeks information pertinent to the issue of plaintiffs' standing, this relevance provides a reason in addition to those discussed in the majority opinion for affirmance of the decision of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 Civ. 5590 (RLC)

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs,

v.

JAMES BAKER,III, SECRETARY OF THE TREASURY,
AND ROSCOE L. EGGER, JR.,
COMMISSIONER OF INTERNAL REVENUE, *et al.*,
Defendants.

May 8, 1986

OPINION

Plaintiffs, on March 19, 1986, renewed their motion for an order adjudging the United States Catholic Conference ("USCC") and the National Conference of Catholic Bishops ("NCCB") in civil contempt. In a letter dated March 6, 1986, counsel for the USCC/NCCB stated that the "USCC/NCCB have asked me to advise the Court that they cannot, in conscience, comply with the subpoenas in question." The USCC/NCCB are unquestionably in contempt; what is at issue is their *bona fides* during this protracted discovery dispute. Plaintiffs charge the USCC/NCCB with bad faith; the latter protest their good faith and respect for the court. In the court's view the USCC/NCCB have done more than simply exercise bad judgment; they have wilfully misled the

court and the plaintiffs and have made a travesty of the court process.

The court assumes familiarity with the history of this case, which has already been the subject of three published opinions. *See Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982) (*"ARM I"*); 552 F. Supp. 364 (S.D.N.Y 1982) (*"ARM II"*); and 603 F. Supp. 970 (S.D.N.Y. 1985) (*"ARM III"*). Nonetheless, a recital of that history will provide an illuminating context for the facts giving rise to the instant motion. Plaintiff individuals and organizations challenge enforcement of § 501(c)(3) of the Internal Revenue Code which provides tax exempt status to charitable and educational institutions. Plaintiffs challenge the tax-exempt status of the Roman Catholic Church. They assert that the Church's lobbying and political activities against abortion render the exemption unlawful under § 501(c)(3) of the Internal Revenue Code. They also argue that the exemption violates the First Amendment to the United States Constitution. The individual plaintiffs complain because they are unable to deduct from their income contributions that they make to organizations promoting abortion, whereas taxpayers who oppose abortion can make tax-deductible contributions to the USCC and NCCB. The organizational plaintiffs complain because they are denied tax-exempt status for advocating abortion, whereas the USCC/NCCB enjoys such status and is free to engage in anti-abortion activities.

In *ARM I*, the USCC/NCCB, originally named as defendants, were dismissed on the grounds that plaintiffs had asserted no valid claim against them. The court held, however, that the plaintiffs could proceed against the Secretary of the Treasury and the Commissioner of Internal Revenue ("the government"). In addition, the court held that some, but not all, of the plaintiffs had standing to bring this action, and that the Anti-Injunction Act, 26 U.S.C. § 7421, did not bar the suit. The

government then sought certification of the latter two determinations for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and a stay of discovery. The USCC/NCCB joined in the government's certification motion and, as we noted at the time, "somewhat surprisingly, since they are no longer parties to the litigation," joined in the motion to stay discovery as well. *ARM II*, 552 F. Supp. at 366. Both motions were denied. *Id.* at 367.

Plaintiffs served subpoenas on the USCC/NCCB as third parties in March, 1983. A motion to quash the subpoenas was made in April, 1983. Subsequently, the government moved for a stay pending decision by the United States Supreme Court in *Wright v. Regan*, subsequently decided *sub nom. Allen v. Wright*, —— U.S. ——, 104 S.Ct. 3315 (1984). The court denied the motion because it was not as sanguine as defendants that any decision in *Wright* would alter the court's reasoning in *ARM I*. However, it suggested a schedule of discovery which would postpone the most costly discovery until the Supreme Court had spoken. Despite this ruling, the USCC/NCCB refused to produce any documents at all, and insisted that none be produced until *Wright* was decided.

After the Supreme Court decision in *Wright* the government again moved to dismiss for lack of standing. That motion was denied on March 27, 1985. *ARM III*, *supra*. The government, joined by the USCC/NCCB, again sought certification of an interlouctory appeal. That motion was denied on July 12, 1985, in an unpublished memorandum decision.

Plaintiffs had by this time reactivated their subpoenas addressed to the USCC/NCCB, which continued to refuse production. In June, 1985, the USCC/NCCB moved the court for a protective order.

On July 12, 1985, the very day on which the government's second § 1292 motion was denied, the USCC/

NCCB performed the first act of the wasteful charade that is the subject of this opinion. On that day, the court held a conference with the parties and the USCC/NCCB concerning the subpoenas and the outstanding motion for a protective order.

At this point it is appropriate to point out that litigants are free to opt for a citation of contempt if that is the only available avenue to obtain review of what they consider incorrect determinations by a lower court. Moreover, litigants may certainly take all steps to seek review short of contempt and resort to that step only as their last refuge. The court could not fault such behavior. If, at this July meeting, counsel had advised the court that the USCC/NCCB would continue to seek appellate review and that they had resolved to subject themselves to a contempt order should other means of appellate review fail, there would be no cause to complain today. But the USCC/NCCB did more than fail to be forthright with the court. They began to engage the court and the plaintiffs in a series of maneuvers that—given the USCC/NCCB's apparent intention of ultimate non-compliance—made a game of the judicial process.

At that July 12 meeting, the USCC/NCCB stated its concerns about infringement of their religious freedoms through enforcement of the subpoenas. In response, the court emphasized that it would not permit plaintiffs to engage in any broad-gauged incursion into the USCC/NCCB files, but would permit discovery only of matters demonstrably relevant to the issue before the court. The USCC/NCCB complained of wide publicity given to a document that the plaintiffs had previously received. The court censured that practice and barred plaintiffs from making public any discovery materials produced by the USCC/NCCB, since the court assumed that any documents obtained were sought solely for the purposes of litigation.

Sometime after that conference plaintiffs filed a motion for an order adjudging the USCC/NCCB in contempt because they still refused to comply with the subpoena. On September 4, 1985, the court, in an endorsement, spelled out which documents should be produced and which documents were shielded by the First Amendment. Some of the documents sought were already in the public realm, and there appeared to be no basis for withholding them. As to the religious freedom issue, the court found that documents listed in two paragraphs of the subpoena "are the only documents which could conceivably trench on First Amendment considerations," and held that those documents need not be produced at the time. Plaintiffs were ordered to narrow their requests as to those items, and both sides were asked to present their views as to whether required production of these items, even as more narrowly and precisely defined, would nonetheless violate the First Amendment. The court found the remainder of the materials unprotected and held that there remained no justification for refusing to abide by the court's order. The court refused to hold respondents in contempt but advised plaintiffs that if the unprotected documents were not produced, the motion could be renewed.

No documents were produced. In October, 1985, plaintiffs renewed their motion for an order of contempt. On October 25, 1985, the court held yet another conference to discuss the plaintiffs' motion and respondents' request for a protective order. The court painstakingly reviewed the matter with counsel. At that time a mandamus petition, filed by the government and joined by respondents, was pending before the Court of Appeals. The parties were ordered to agree on a stipulation of confidentiality and to agree on which documents would be subject to the confidentiality order. All other issues that counsel for respondents raised were discussed and, counsel asserted, resolved.

In an order dated November 20, 1985, the court recorded what had been accomplished at the conference,

supposedly resolving all objections to compliance with the subpoenas. The motion for contempt was denied, and compliance with the subpoenas was postponed until the Second Circuit's determination of the pending mandamus petition. With the exception of matter delineated in the order or new matters that might arise by virtue of the Second Circuit determination, further objections to plaintiff's subpoenas were barred.

The Second Circuit denied the mandamus petition on January 14, 1986. The USCC/NCCB continued to defy the court order. Another motion for contempt was filed on February 6, 1986. The USCC/NCCB in opposition urged the court to wait for the outcome of a petition to the Second Circuit to rehear the case *en banc*.

On February 26, 1986, the court again denied plaintiffs' motion without prejudice and ordered compliance with the subpoenas on or before March 7, 1986, unless in the interim the Second Circuit granted the petition for rehearing. On March 3, 1986, the Second Circuit denied the petition and the March 6, 1986 letter quoted above followed.

All of this effort to protect the USCC/NCCB's acknowledged interests are now shown to have been utterly, utterly futile. Had the court been told that the USCC/NCCB intended to seek appellate review by defying any subpoena, no matter how narrowly circumscribed, it could have stayed all action on the subpoenas until other avenues to bring the matter before the Second Circuit had been ventured. In the event that those avenues failed, the contempt order would have followed. We would be exactly where we are today, less the baggage of plaintiffs' assertions of bad faith and delay and the court's conclusion that plaintiffs' complaints are amply justified.

Respondents correctly note that the Second Circuit's refusal to grant the petition for mandamus gives no in-

dication of its views as to the merits of the underlying issues. Yet precedent is such that denial was all but a certainty. Mandamus is, after all, an extraordinary writ. The most efficacious route to a review by the Court of Appeals under the circumstances was by review of an adjudication of respondents in contempt. The government had no basis for using a contempt adjudication to get an appeal before the Second Circuit. The USCC/NCCB did.[1] Counsel *must* have foreseen that such was their most likely recourse. Hence, I agree with plaintiffs that the USCC/NCCB's vigorous activities up to now—seeking protective orders, holding conferences with the court and plaintiffs to discuss and agree on matters which could be subject to confidentiality protection—have been a complete waste of time and energy. The result has been to stall and frustrate plaintiffs' efforts for an early resolution of their right to obtain discovery. For that reason, sanctions for each day's delay are appropriate.

The respondents concede that they are in contempt and the facts are not in dispute. Moreover, the respondents, from the first motion for contempt filed on June 20, 1985 until now have been accorded plentiful opportunities to be heard. Therefore, no formal hearing is now required. *Parker Pen Co. v. Greenglass*, 206 F. Supp. 796 (S.D.N.Y. 1962) (Dawson, J.). Sanctions may be imposed. *Danielson v. United Seaworkers Smoked Fish & Cannery Union*, 405 F. Supp. 396, 403 (S.D.N.Y. 1975) (Carter, J.); *MCA, Inc. v. Wilson*, 425 F. Supp. 457, 459 (S.D.N.Y. 1977) (Cooper, J.). The USCC/NCCB are adjudged in contempt for refusing to comply with

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[1] Apparently, what the government and USCC/NCCB would like is appellate review of the merits of this Court's rulings in *ARM I* and *ARM III* prior to any trial before this Court. It is questionable whether appeal of the contempt order will get the merits of the controversy before the Court of Appeals. It will, however, put in issue the validity of the subpoenas and of the Court's order that the USCC/NCCB produce the requested documents.

the February 26, 1986 order of the court. Beginning May 12, 1986, for each day that the USCC/NCCB continues to defy the court's order, each will be subject to a fine of $50,000 per day.

IT IS SO ORDERED.

Dated: New York, New York
May 8, 1986

/s/ Robert L. Carter
ROBERT CARTER
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 Civ. 5590 (RLC)

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs,

—v—

JAMES A. BAKER, III, Secretary of The Treasury, and ROSCOE L. EGGER, JR., Commissioner of Internal Revenue., *et al.*,

Defendants.

ORDER

At a hearing in the above matter held on May 9, 1986 on an order to show cause why sanctions imposed on the United States Catholic Conference and National Conference of Catholic Bishops (USCC/NCCB) should not be stayed, and after argument,

NOW, it is

1. ORDERED, that this Court's opinion of May 8, 1986 is amended to add that it is the judgment of this Court that plaintiffs are entitled to attorneys' fees for the time spent in discovery conferences with the Court and negotiations with USCC/NCCB after the conferences concerning subpoenas and for the motion for contempt filed March 19, 1986. A petition for fees should be filed within ten days of the final disposition of the appeal of the May 8 opinion; and it is

2. FURTHER ORDERED that the application of USCC/NCCB for a stay of the imposition of the daily

fines of $50,000 for each organization is granted and the imposition of the fines is stayed to and including May 16, 1986, with the understanding that the stay is granted to allow USCC/NCCB to perfect their appeal and that any further stay or other relief from this Court's order of May 8, 1986 must be obtained from the Court of Appeals.

Dated: May 9, 1986

/s/ Robert L. Carter
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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80 Civ. 5990 (RLC)

ABORTION RIGHTS MOBILIZATION, INC., LAWRENCE LADER, HAROLD W. BOSTROM, MARGARET O. STRAHL, M.D., HELEN W. EDEY, M.D., RUTH P. SMITH, NATIONAL WOMEN'S HEALTH NETWORK, INC., LONG ISLAND NATIONAL ORGANIZATION FOR WOMEN-NASSAU INC., RABBI ISRAEL MARGOLIES, REVEREND BEA BLAIR, RABBI BALFOUR BRICKNER, REVEREND ROBERT HARE, REVEREND MARVIN G. LUTZ, LAUREN CLINIC, INC., MILAN M. VUITCH, M.D., WOMEN'S CENTER FOR REPRODUCTIVE HEALTH CENTERS, INC., HARRISBURG REPRODUCTIVE HEALTH SERVICES, INC., HAGERSTOWN REPRODUCTIVE HEALTH SERVICES, INC., WOMEN'S HEALTH SERVICES, INC., JANE C. DELGADO, JENNIE ROSE LIFRIERI, EILEEN WALSH, PATRICIA SULLIVAN LUCIANO, MARCELLA MICHALSKI, CHRIS NIEBRZYDOWSKI, JUDITH A. SEIBEL, KAREN DECROW, AND SUSAN SHERER,

Plaintiffs,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY, ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE, UNITED STATES CATHOLIC CONFERENCE, INCORPORATED, AND NATIONAL CONFERENCE OF CATHOLIC BISHOPS,

Defendants.

July 19, 1982

OPINION

ROBERT L. CARTER, District Judge.

This is an action challenging the constitutionality of the government's enforcement of § 501(c)(3) of the Internal Revenue Code ("Code"), 26 U.S.C. § 501(c)(3) (1976). Plaintiffs are 29 individuals and organizations concerned about the right of a woman to choose to carry a fetus to term or to abort it and about the constitutionally mandated separation of church and state. The complaint names four defendants: two government officers ("government" or "federal defendants"), Donald T. Regan, the Secretary of the Treasury, and Roscoe L. Egger, Jr., the Commissioner of Internal Revenue, and the two principal national organizations of the Roman Catholic Church in the United States ("church defendants"), the United States Catholic Conference, Incorporated ("USCC"), and the National Conference of Catholic Bishops ("NCCB").

Defendants move to dismiss the action. They assert that none of the plaintiffs has the requisite standing to bring the suit, that the complaint does not state a claim upon which to grant relief, and that the court may not review the particular decisions to enforce or not to enforce § 501(c)(3) that are in dispute. In addition, the church defendants contend that they are not proper parties to this suit and that § 501(c)(3) is unconstitutional. For the reasons discussed herein, the motions to dismiss are granted in part and denied in part.

I

A. *The Plaintiffs*

The complaint names nine organizations and twenty individuals as plaintiffs. Each plaintiff (except Judith Seibel) has submitted an affidavit to augment the complaint's description of that plaintiff's particular concerns and injuries. The plaintiffs are described briefly here;

their particular grievances are discussed in greater detail *infra*.

Abortion Rights Mobilization, Inc. ("ARM") is a non-profit, tax exempt organization under § 501(c)(3) that seeks to secure and implement a women's right to a legal abortion. It is a national organization and is prohibited from engaging in political activity under the terms of its tax exemption. Contributions to ARM are tax-deductible.

Lawrence Lader is a writer, and founder and president of ARM. He has been active in the abortion rights movement and has written a number of books on the subject.

Harold W. Bostrom, Margaret O. Strahl, M.D., Helen W. Edey, M.D., and Ruth P. Smith all contribute to ARM, other abortion rights organizations and pro-choice political candidates.

National Women's Health Network, Inc. ("NWHN") is a tax-exempt membership organization of many clinics, counseling services, publishers and others who provide a wide range of services to women and attempt to influence the public to support women's rights, including the right to have an abortion. Contributions to NWHN are tax-deductible, but the organization is prohibited under § 501(c)(3) from engaging in electoral politics.

Long Island National Organization For Women ("Nassau-NOW") is a membership organization dedicated to the promotion of women's rights, including the right to have an abortion. Nassau-NOW is exempt from taxes under § 501(c)(4) of the Internal Revenue Code.

Rabbi Israel Margolies, Reverend Beatrice Blair, Rabbi Balfour Brickner, Reverned Robert Hare and Reverend Marvin G. Lutz ("clergy plaintiffs") are members of the clergy whose religious beliefs differ significantly from the Catholic Church's view of abortions. These clergy members have been active in the abortion rights movement but have not used the power of their pulpits to engage in political activities.

Laurel Clinic, Inc., Women's Center for Reproductive Health, The Federation of Feminist Women's Health Centers, Inc., Harrisburg Reproductive Health Services, Inc., Hagerstown Reproductive Health Services, Inc. and Women's Health Services, Inc. are clinics that offer to women a range of medical and other services, including abortions. The Federation of Feminist Women's Health Centers, Inc., Women's Health Services Inc. and the Women's Center for Reproductive Health are exempt from taxes under § 501(c)(3).

Milan M. Vuitch, M.D., is president of the Laurel Clinic, Inc.

Jane C. Delgado, Jennie Ross Lifrieri, Eileen Walsh, Patricia Sullivan Luciano, Marcella Michalski, Chris Niebrzydowski and Judith A. Seibel are Roman Catholics who, in keeping with their religious beliefs, contribute or have contributed to the church but who nonetheless are opposed to the church's position on abortion.

Karen DeCrow is a leader of the feminist movement and a former national president of the National Organization for Women. She was a candidate for political office in 1969 and is a potential candidate in the future.

Susan Sherer is active in the abortion rights movement.

All the individual plaintiffs are taxpayers and voters. Each of them in his or her affidavit expresses a substantial concern for the separation of church and state that is required by the establishment clause of the first amendment. Finally, plaintiff Brickner, as a private citizen, is chairman of the national issues committee of the New York State Liberal Party.

B. *The Statutory Scheme*

Section 501(c)(3) of the Code exempts from taxation groups "organized and operated exclusively for religious, charitable, . . . or educational purposes, . . . no substantial part of the activities of which is carrying on prop-

aganda, or otherwise attempting, to influence legislation . . ., and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." 26 U.S.C. § 501(c)(3) (1976). Organizations exempt from income taxation under this section in effect receive a double benefit because § 170(a), (c)(2)(B) of the Code permits an income, gift or estate tax deduction for contributions to most § 501(c)(3) entities. *See* 26 U.S.C. § 170 (1976). Section 501(c)(3) status, thus, is valuable to an organization because the organization can provide donors with an economic incentive to contribute to it and the organization is not taxed on the income received. Organizations exempt from taxation under other portions of § 501, by contrast, often are not entitled to receive tax-deductible contributions. *See* 26 U.S.C. §§ 170, 501 (1976).

To maintain the dual benefits of tax exemption and deductible contributions, a § 501(c)(3) entity must refrain from any kind of campaigning for candidates for public office. 26 U.S.C. § 170(a), (c)(2)(D) (1976); *id.* § 501(c)(3). These groups, however, are allowed to lobby as long as their attempts to influence legislation do not constitute a "substantial part" of their activities. 26 U.S.C. § 501(c)(3) (1976).

C. *The Dispute*

The Internal Revenue Service ("IRS"), annually since March 25, 1946, has ruled that "the agencies and instrumentalities and all educational, charitable, and religious institutions operated, supervised, or controlled by or in connection with the Roman Catholic Church in the United States, its territories or possessions appearing in the Official Catholic Directory . . . are entitled to exemption from Federal income tax under . . . section 501(c)(3). . . ." Exh. A to church defendants' Motion to Dismiss (Letter from T. Kern, District Director, IRS to

USCC, June 16, 1980). Defendant USCC is the recipient of the Revenue Ruling letter that certifies the church's exemption status.

Plaintiffs contend that this grant of § 501(c)(3) privileges was erroneously and illegally conferred because the church defendants are engaged in a nationwide plan to change abortion laws by, *inter alia*, lobbying and participating in partisan political campaigns on behalf of candidates supporting the Roman Catholic Church's position on abortion and in opposition to candidates with contrary views. Amended Complaint ¶¶ 21-28; *cf. McRae v. Califano*, 491 F.Supp. 630, 703-28 (E.D.N.Y.), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (describing some of the church's electoral and legislative activities pursuant to its "Pastoral Plan" to outlaw abortion). Despite this violation of the Code, plaintiffs allege, the government defendants have declined to apply the § 501(c)(3) prohibition against electioneering or lobbying to the church defendants and their subsidiaries. By contrast, no organization with different views on the abortion controversy has been granted tax-exempt status under 501(c)(3) while being permitted to participate in electoral politics.

Plaintiffs contend that this illegal activity has injured them in several ways. The individual plaintiffs and the members of certain of the institutional plaintiffs have been denied access to a means of contributing tax-deductible funds to promote free choice candidates. Persons with opposing views about abortion, on the other hand, can use the church to funnel donations to support candidates opposed to abortion and thereby receive a tax benefit. Those plaintiffs who have stood for office or aspire to do so on a pro-choice platform have no means of collecting tax-deductible and exempt funds for their campaign chests. Their opponents may do so. The govern-

ment defendants, it is alleged, have diminished the effectiveness of plaintiffs' political speech and their chances to prevail at the polls by enhancing the voice of plaintiffs' political adversaries.

Plaintiffs also express concern about the entanglement of church and state through the selective grant of an unrestricted tax exemption to the church defendants. The government defendants' actions are viewed by plaintiffs as selecting a favored state orthodoxy, thereby breaching the wall between church and state and denigrating religious beliefs out of government favor. In addition, plaintiffs who are religiously compelled to consider abortion as the correct response to pregnancy or who, as ministers, must counsel their congregants to do the same, express the fear that government financial support, through the Code, of the Roman Catholic Church's position on abortion will imperil the opportunity of women to obtain abortions and thereby frustrate their ability to observe their religious beliefs. Plaintiffs who are members of and contributors to the Roman Catholic Church object to their church's political use of the religiously compelled contributions.

The organizational plaintiffs complain that the government defendants have treated them differently from the church for no rational reason. In addition, those plaintiffs offering medical services to women, including abortion, assert that as a result of the church defendants' government subsidized political campaigning, restrictive abortion legislation has been enacted that has caused a decrease in plaintiffs' revenues.

Plaintiffs seek a declaration from the court that the political activities of the Roman Catholic Church and the inaction by the Secretary and the Commissioner violate the Constitution and the Code. In addition, plaintiffs request an order requiring the government defendants to take all actions necessary to enforce the Constitution and the Code, including revocation of the church defendants' § 501(c)(3) status, collection of all taxes due, and notification to church contributors that they may not deduct such contributions.

Jurisdiction is founded on 28 U.S.C. §§ 1331, 1340, 1361.

II

Defendants challenge plaintiffs' standing to bring an action concerning the tax status of third parties. Plaintiffs respond by asserting three bases for their right to proceed: establishment clause standing, voter standing, and equal protection standing.[1]

A. *Article III Requirements*

The Supreme Court recently has had occasion to examine and clarify the rules for standing in federal courts.

> "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72 [98

[1] Plaintiffs have withdrawn a fourth theory of standing based upon their status as taxpayers. Taxpayer standing is a narrow grant to challenge Congressional action under the taxing and spending power of Art. I, § 8 of the Constitution. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, —— U.S. ——, ——, 102 S.Ct. 752, 762-63, 70 L.Ed.2d 700 (1982) [hereinafter cited as *Valley Forge*]; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 174-75, 94 S.Ct. 2940, 2945-2946, 41 L.Ed.2d 678 (1974).

For purposes of ruling on the standing question, the court must accept as true all material allegations in the complaint, construe the complaint in favor of the plaintiffs and similarly consider supporting affidavits. *E.g. Warth v. Seldin*, 442 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.E.2d 343 (1975).

S.Ct. 2620, 2629, 57 L.Ed.2d 595] (1978), quoting *Baker v. Carr*, 369 U.S. 186, 204 [82 S.Ct. 691, 703, L.Ed.2d 663] (1962). This requirement of a "personal stake" must consist of "a 'distinct and palpable injury . . .' to the plaintiff," *Duke Power Co.*, 438 U.S. at 72 [98 S.Ct. at 2629], quoting *Warth v. Seldin*, 442 U.S. 490, 501 [95 S.Ct. 2197, 2206, 45 L.Ed.2d 343] (1975), and 'a fairly traceable' causal connection between the claimed injury and the challenged conduct," *Duke Power Co.*, 438 U.S. at 72, [98 S.Ct. at 2629], quoting *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 261 [97 S.Ct. 555, 561, 50 L.Ed.2d 450] (1977).

Larson v. Valente, —— U.S. ——, ——, 102 S.Ct. 1673, 1680, 72 L.Ed.2d 33 (1982). In addition to demonstrating an injury that the challenged action caused, plaintiffs must show "the the exercise of the Court's remedial powers would redress the claimed injuries." *Duke Power Co. v. Carolina Env. Study Group, supra*, 438 U.S. at 74, 98 S.Ct. at 2630; *accord, Larson v. Valente, supra* 102 S.Ct. at 1682 n. 15; *Simon v. E. Ky. Welfare Rights Organization*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976). The Court's statements indicate that a three step inquiry should be observed in determining Article III standing: injury in fact must be ascertained, a causal link between the injury and the putatively illegal conduct must be identified, and the court must be able to provide a remedy.[2]

1. *Establishment Clause Standing.* The existence of Article III injury "often turns on the nature and source of the claim asserted." *Warth v. Seldin, supra*, 442 U.S. at 500, 95 S.Ct. at 2205. The injury in fact requirement

[2] Although some opinions have described the test as a two pronged one, the second "prong" seemingly contains two discrete, albeit closely related, elements; causation and redressability. For purposes of clarity, the test therefore shall be considered to analyze three separate factors.

can be satisfied by a wide range of harms, including economic, aesthetic, environmental, or spiritual damage. *See, e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 111-12, 99 S.Ct. 1601, 1613-1614, 60 L.Ed.2d 66 (1979) (denial of right to interracial association); *Duke Power Co. v. Carolina Env. Study Group, supra*, 438 U.S. at 73-74, 98 S.Ct. at 2629-2630 (environmental and aesthetic consequences of pollution); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973) (enjoyment of natural resources); *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 208-210, 212, 83 S.Ct. 1560, 1563-1564, 1565, 10 L.Ed.2d 844 (1963) (spiritual values). There is no invariant meaning to the term "palpable injury"; the Constitution or a statute can create an interest that exists only in the legal regime, and damage to such an interest may fulfill the injury in fact requirement. *See Valley Forge, supra*, 102 S.Ct. at 769 (1982) (Brennan, J., dissenting); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152, 71 S.Ct. 624, 638, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

Although the Supreme Court has recognized that violation of a person's "spiritual stake in the First Amendment values" of separation of church and state may inflict sufficient harm to satisfy the injury in fact test, *see Data Processing Service Organization v. Camp*, 397 U.S. 150, 154, 95 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970), *citing School Dist. of Abington Township, Pa. v. Schemmp, supra*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, it has cautioned that offense to one's sense of fidelity to separatist principles is an insufficient injury to bring suit for an alleged establishment clause violation. *See Valley Forge, supra*, 102 S.Ct. at 764-66; *Doremus v. Bd. of Education*, 342 U.S. 429, 431, 433-34, 72 S.Ct. 394, 396, 396-97, 96 L.Ed. 475 (1952). Would be plaintiffs must show that they are "directly affected by the laws and practices against which their complaints are directed."

School Dist. of Abington Township, Pa. v. Schempp, supra, 374 U.S. at 224 n.9, 83 S.Ct. at 1572 n.9.

In *Valley Forge,* the Supreme Court overturned a decision granting standing to an organization suing on behalf of its members who professed injury to their shared individuated right to non-establishment when surplus federal property was transferred to a denominational college.[3] *See* 102 S.Ct. at 764-66. Crucial to the Supreme Court's decision was the complete lack of connection between the plaintiff and the property. Neither plaintiff nor its members alleged any physical contact with the college or its environs, and plaintiff and its members did not claim that they may have been entitled to the property if it had not been given to the college. Although the transfer affronted plaintiff's members' sense of command of the establishment clause, they could not identify any more definite and personalized connection with the objectionable transaction. *See id.* at 766. In the absence of some interest in the property, plaintiff or its members suffered no injury from the transfer.

Similarly in *Doremus v. Bd. Education,* the Court dismissed for lack of standing the complaint of taxpayers contending that a New Jersey statute requiring Bible reading at the opening of the school day violated the establishment clause. *See* 342 U.S. at 430, 72 S.Ct. at 395. Plaintiffs did not allege any personal, religiously inspired interest or activity that the Bible reading interfered with nor did they have any personal contact with the recitations, either through attendance or through children in attendance. *See id.* at 431, 72 S.Ct. at 396.

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[3] Although the *Valley Forge* plaintiffs asserted principally a claim of taxpayer standing, the Supreme Court opinion discussed at length the standards for establishment clause standing. *See* 102 S.Ct. at 763-67. This discussion was in direct response to the basis for finding standing that the Court of Appeals had articulated. *See id.* at 763-64.

Underlying the rejection of plaintiffs' standing in *Valley Forge* and *Doremus* is the principle that the interest of each citizen that the government be administered according to law does not confer standing because it does not create in that citizen a discrete and palpable injury. *Valley Forge, supra,* 102 S.Ct. at 764; *see Schlesinger v. Reservists Comm. to Stop the War, supra,* 418 U.S. at 216-22, 94 S.Ct. at 2929-2932 (1974). Plaintiffs asserting establishment claims, as any other plaintiffs, have "no special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge, supra,* 102 S.Ct. at 766 (footnote omitted).[4]

The individual plaintiffs' concern about the establishment clause violations perpetrated by the defendants does not rise above the whistleblowing that the Supreme Court held, in *Valley Forge,* does not satisfy the injury requirement. Plaintiffs attempt to articulate injury in fact by linking the offending activity with their involvement in the abortion rights controversy. They describe the government action of which they complain as a subsidy to opponents of abortion that impacts on plaintiffs' particu-

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[4] The crucial standing defect in the claim of a citizen alleging governmental misconduct and nothing more is not that the alleged misconduct does not inflict harm on someone, but that the wrongdoing does not injure the plaintiff personally. Such allegations may be sufficient to make out a claim that someone has been injured; they fail to confer standing because they do not satisfy the Article III requirement that the plaintiff be among those who have suffered the injury. *See Warth v. Seldin, supra,* 422 U.S. at 502, 95 S.Ct. at 2207; *Fed'n for Am. Immigration Reform v. Klutznick,* 486 F.Supp. 564, 568 & n.7 (D.D.C.) (three judge court), *appeal dismissed,* 447 U.S. 916, 100 S.Ct. 3005, 65 L.Ed.2d 1109 (1980).

This standing defect should not be confused with the prudential reason for declining to hear a case that presents a generalized grievance that is better resolved by the executive or the legislature even though the plaintiff has suffered an injury in fact and has satisfied the other Article III standing requirements. *See* p. 484 *infra.*

larized interest to preserve reproductive choice. Plaintiffs argue, in effect, that because they object to an establishment violation occurring in a particular arena of public controversy in which they are involved, they have suffered a discrete and palpable injury not experienced by the *Valley Forge* plaintiff. Plaintiffs' characterization of their injury shares the defect that caused the demise of the *Valley Forge* complaint. In both cases, plaintiffs described an interest that brought them to court, but they did not articulate an injury that they had suffered. Plaintiffs' devotion to the pro-choice position does not identify an interest that the allegedy illegal activities have damaged; it only explains why plaintiffs have chosen to complain about a particular government impropriety—renewal of the church defendants' § 501(c)(3) status—and not about some other wrongdoing. Plaintiffs' "special interest" in reproductive freedom is no different than the *Valley Forge* plaintiff's "special interest" in strict separation. The narrowness of the focus of litigant's concerns is not of constitutional significance as far as standing is concerned. There is no indication in the *Valley Forge* opinion that the plaintiff there would have met the injury in fact test if it single-mindedly pursued its anti-establishment goals in the field of public education only, rather than its objections to government support for any religious body or activity. *See id.* 102 S.Ct. at 765 ("standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.").[5]

[5] Several Roman Catholic laity assert claims of injury that could be distinguishable from the claims of the public generally. These plaintiffs object to the federal defendants' standing aside while the church violates § 501(c)(3) by using funds contributed to it, including donations from the plaintiffs, to electioneer for anti-abortion candidates. Such claims might be construed to plead injury to the plaintiffs' church from non-enforcement of the Code. The establishment clause was designed not only to protect civil society from undue pressures from spiritual communities within it, but also to protect the sacred life of the population from the taint of secular politics. *See Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 39-40, 53-54, 67 S.Ct. 504, 522-523, 529-530, 91 L.Ed. 711 (1947)

The organizational plaintiffs also fail to set out the injury in fact to themselves or their members that is necessary to confer standing under the establishment clause. They merely allege concern about the first amendment violations arising from the church's political activity while it enjoys § 501(c)(3) status. As did the individual plaintiffs, the organizations have explained why they are moved to bring suit to end these violations; they have not, however, explained how the violations injure them.[6]

The clergy plaintiffs and the Women's Center for Reproductive Health ("Women's Center") have disclosed, in their affidavits, compelling and personalized injuries flowing from the tacit government endorsement of the Roman Catholic Church position on abortion that are sufficient to confer standing on them to complain of the alleged established clause violations. The clergy plaintiffs

(Rutledge, J., dissenting); Memorial and Remonstrance Against Religious Assessements ¶¶ 6-8, *reprinted in id.* at 67-68, 67 S.Ct. at 536-537.

In their affidavits, however, these plaintiffs do not express concern for the pollution of their church by its forbidden entrance into the area of politics. Their expressed claims are limited to injuries to their "rights to live in a society that believes in freedom of religion." *E.g.* Delgado affidavit ¶ 5; Walsh affidavit ¶ 5. This is a generalized harm experienced as a citizen, not as a church member, and is a harm that is indistinguishable from the injury inflicted upon all citizens by executive disregard for the law. Because these plaintiffs have not complained of a distinct and palpable injury inflicted upon them as practicing Roman Catholics, they have no standing under the establishment clause.

[6] The groups providing medical services to women arguably occupy a different position from the other institutional plaintiffs because they allege threatened or actual economic loss from the defendants' illegal activities. This injury, however, will not confer standing because the causal link between the church's tax status and these plaintiffs' lost revenues is tenuous at best. It is doubtful that the marginal increase in the coffers of the foes of abortion that is attributable to the church's tax exemption is a significant factor in legislation that has reduced the income of abortion clinics.

have devoted their lives to religious communities and beliefs that are denigrated by government favoritism to a different theology. They provide spiritual leadership to and care for the spiritual needs of their congregations. As part of these duties, they must counsel those in their care in accordance with religious laws that command consideration of abortion as the morally required response to pregnancy.[7] The Women's Center provides guidance to women in decisionmaking on issues pertaining to family life, including childbearing. It was founded by Reverend Lutz along with others to put the principles of the Presbyterian Church into effect. As with the clergy plaintiffs, the Women's Center's religiously inspired mission is denigrated by government endorsement of a theology contrary to its guiding principles.

Tacit government endorsement of the Roman Catholic Church view of abortion hampers and frustrates these plaintiffs' ministries. The government need not silence these plaintiffs to cause discrete spiritual injury because of official approval of an orthodoxy antithetical to their spiritual mission diminishes their position in the community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message. The spiritual values protected by the establishment clause can be injured without direct coercion against individuals, *see Engel v. Vitale*, 370 U.S. 421,

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[7] The clergy plaintiffs have identified in their affidavits their respective denominations' attitudes towards pregnancy and abortion. These affidavits state that certain theologies consider compelling a woman to carry a fetus to term as repugnant as other theologies, such as the contemporary Roman Catholic Church doctrine, find abortion, *see* Affidavit of Rabbi Israel Margolies ¶ 3 ("To force a woman to bring an unwanted fetus into the world is a serious abridgement of the Bible . . ."), and that the availability of safe abortions may be necessary to permit a women to fulfill her religious obligations, *see* Affidavit of Rev. Beatrice Blair ¶¶ 5-6 ("part of Episcopalian doctrine that women and families should be free to terminate [certain] pregnancies."); *cf. McRae v. Califano, supra*, 491 F.Supp. at 696-702 (discussing pro-choice theological doctrines).

430-31, 82 S.Ct. 1261, 1266-1267, 8 L.Ed.2d 601 (1962) (indirect coercive pressure to conform to officially approved doctrine), even if plaintiffs have not alleged that particular religious freedoms have been infringed, *School Dist. of Abington Township, Pa. v. Schempp, supra*, 374 U.S. at 224 n.9, 83 S.Ct. at 1572 n.9 (1963). It is sufficient to establish injury in fact that plaintiffs can show, as the clergy plaintiffs have, that the challenged action adversely affects them in their daily lives. *See id.*

These plaintiffs also clearly satisfy the second and third aspects of the Article III standing test—causation and redressability. Their injury flows directly from the federal defendants' allowing the church defendants the privilege of retaining § 501(c)(3) status while electioneering and denying this privilege to other religious organizations. The granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others. A decree ordering the termination of this illegal practice and restoring all sects to equal footing will redress this injury. Accordingly, the clergy plaintiffs and the Women's Center meet the Article III requirements for standing to raise claims under the establishment clause.

2. *Voter standing.* In *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court conferred "voter standing" on a group of Tennessee citizens challenging the state's apportionment scheme as "effecting a gross disproportion of representation to voting populations." *Id.* at 207, 82, S.Ct. at 704. The plaintiffs asserted that the classification disfavored the voters in some counties by "placing them in a position of unjustifiable inequality *vis-a-vis*" voters in other counties. *Id.* These allegations stated sufficient injury to satisfy the Article III standing requirements.

Baker's voter standing analysis was applied in three cases that strongly support a finding that the individual

plaintiffs [8] and certain of the organizational plaintiffs [9] have aserted a distinct, personal injury that confers standing. Two of the cases, like the instant action, involved challenges to the enforcement of the tax laws. All three are highly instructive.

Tax Analysts and Advocates v. Schultz, 376 F.Supp. 889 (D.D.C. 1974), involved a challenge to an IRS revenue ruling stating that gifts of up to $3,000 to multiple finance committees organized to receive campaign con-

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[8] Plaintiffs Lader, Bostrom, Strahl, Edey, Smith, Margolies, Blair, Brickner, Hare, Lutz, Vuitch, Delgado, Lifrieri, Walsh, Luciano, Michalski, Niebrzydowski, Seibel, DeCrow, and Sherer.

[9] None of the organizational plaintiffs can allege injury to themselves as organizations in the context of voter standing. *See Simon v. E. Ky. Welfare Rights Organization, supra*, 426 U.S. at 39-40, 96 S.Ct. at 1924-1925 (1976); *Fed'n for Am. Immigration Reform v. Klutznick, supra*, 486 F.Supp. at 569. Organizations can establish standing, however, "as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right. *Warth v. Seldin, supra*, 442 U.S., at 511 [95 S.Ct., at 2211]." *Simon v. E. Ky. Welfare Rights Organization, supra*, 426 U.S. at 40, 96 S.Ct. at 1925; *see Common Cause v. Democratic Nat'l Comm.*, 333 F.Supp. 803, 809 & n.11 (D.D.C. 1971). National Women's Health Network, Inc., ARM and Nassau-NOW are devoted to promoting women's rights, including the right to a legal abortion. Given the political orientation of this organizational purpose, these entities have powerful claims to represent voter-members "uniquely, or even predominantly, injured" by the challenged government conduct. *Ripon Society v. Nat'l Republican Party*, 525 F.2d 567, 573 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976). In any event, the organizational plaintiffs' standing will depend upon their members' satisfaction of the requirements of voter's standing, and the groups' participation in the case cannot "lessen the controversy, or blur the presentation of issues . . . in any way." *Id.* at 574.

The other organizational plaintiffs nowhere allege that they or their members engage in any political activity or that they are involved in affecting the legislative process in any substantial manner. In the absence of such allegations, these organizations have no standing to represent their members' interests under the voter standing doctrine.

tributions for the same candidate were to be treated as gifts to the committee and not to the candidate. Plaintiffs, a nonprofit corporation promoting tax reform and one of its members, alleged that the revenue ruling was illegal because it permitted individuals to donate unlimited sums and to escape gift taxes by donating $3,000 increments to separate committees which served only to funnel the money to central committees for the particular candidate. *Id.* at 891. Focusing on the corporate plaintiff's membership in applying the standing tests, the court noted that the named member was "a taxpaying citizen, voter and small contributor to election campaigns." *Id.* at 898. As such, plaintiff asserted that the challenged ruling substantially diminished "his ability to affect the electoral process and to pursuade elected officials to adopt policies and programs he favors" by increasing the influence of a favored class of large contributors. *Id.* Applying constitutional standing doctrine to these circumstances, the court held that alleged diminution of one's vote and dilution of the ability to affect the electoral process "are judicially recognized wrongs and are thus sufficient allegations of actual injury." *Id.* at 899

Two Illinois voters, one a political candidate, the other a supporter, had standing to challenge the patronage system in Cook County because of the alleged injury to their interest "in an equal chance and an equal voice" in the election process. *Shakman v. Democratic Organization of Cook County*, 435 F.2d 267, 269-70 (7th Cir. 1970), *cert. denied*, 402 U.S. 909, 91 S.Ct. 1383, 28 L.Ed.2d 650 (1971). Since that interest is protected by the federal constitution, impairment thereof gives standing to the victims of the challenged practices. *Id.* at 269; *see Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315, 1328 (N.D. Ill. 1979) (granting summary judgment to plaintiffs).

Finally, in *Common Cause v. Democratic National Comm., supra*, a non-profit public interest corporation,

its chairman (a voter) and two elected politicians sought declaratory and injunctive relief against several national committees of political parties. Plaintiffs alleged that those groups circumvented the statute placing limits on individual campaign contributions. 333 F.Supp. at 806. The government's failure to prosecute these alleged violations resulted in the dilution of plaintiffs' participation in the voting process. *Id.* at 808. The court could find no "serious impediment to the plaintiffs' standing." *Id.*

Grounded in the equal protection safeguards of the fifth, rather than the fourteenth, amendment, plaintiffs' claims seem barely distinguishable from those involved in *Baker*. Both cases center on allegations that some arbitrary government action diluted the strength of voters in one group at the expense of those in another. Plaintiffs' injury is no less real because they claim discrimination based on issues rather than geography, nor is it relevant that the impact of allegedly harmful government conduct is felt during the battle over choosing representatives rather than in the number of representatives technically available to the aggrieved voters. The bottom line is that plaintiffs have alleged government action which has improperly biased the political process against the discrete group to which they belong.

Defendants contend that *Shakman*, *Shultz* and *Common Cause* incorrectly applied the concept of voter standing as set forth in *Baker v. Carr*. *Baker*, it is said, requires a showing of mathematical dilution of voting strength as a prerequisite of voter standing. Such precision supposedly is necessary to establish concrete personal injury.

The rationale of *Baker's* standing analysis cannot be so restricted. *Baker*, the three subsequent decisions and the case at bar all concern allegations that some arbitrary government action impaired one group's ability to affect the political process in preference to a more favored group. The injury to oppressed voters is as distinct and palpable here as in any of the previous cases.

The precision with which an injury can be defined is irrelevant to the concreteness of the injury, but that factor may affect considerations of causation or redressability. Defendants contend that the imprecise allegations of harm in the complaint mask its inadequate showing that defendants' actions have caused the harms plaintiffs allege or that an alteration or threatened alteration of the church defendants' tax status will ameliorate plaintiffs' injuries. Defendants' arguments, however, mischaracterize the complaint as objecting to the church's political activity *per se* and seeking relief in the form of a legislatively guaranteed right to abortion.

Plaintiffs have asserted a more circumscribed grievance and request. They do not demand a discontinuation of the church's political activity, nor do they seek, through the court, to prevent the election of antiabortion candidates. Plaintiffs claim that allegedly unconstitutional government conduct and illegal private conduct have distorted the electoral and legislative process by creating a system in which members of the public have greater incentive to donate funds to the Roman Catholic Church than to politically active abortion rights groups and in which each dollar contributed to the church is worth more than one given to non-exempt organizations. Plaintiffs do not complain of diminished representation and do not demand increases in actual representation. They complain of arbitrary government interference that disfavors them in the process of selecting representatives.

Viewed, as such, there can be no question that, even in the absence of a mathematically demonstrable injury, the complaint satisfies the causation and redressability requirements. Clearly, the government defendants' tax policy is the source of the distortion in the political process that plaintiffs complain of. An injunction against that discriminatory policy will restore the proper balance between adversaries in the abortion debate. The standing question is unaffected by the church defendants' possible

resolve to continue their current rate of political activity despite a decision requiring application of § 501(c)(3) to them and it is unaffected by plaintiffs' ultimate chances of success in their drive to preserve or expand women's rights to choose to complete or to terminate a pregnancy. That the court cannot guarantee plaintiffs' success in the political arena does not signify that the plaintiffs cannot gain anything from this litigation. On the contrary, plaintiffs have the opportunity to redress what they perceive is a grievous imbalance in the electoral and legislative process. It is sufficient for purposes of standing that "the plaintiff has shown *an* injury to himself that is likely to be redressed by a favorable decision.' *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976) (emphasis added) . . . He need not show that a favorable decision will relieve his every injury." *Larson v. Valente, supra*, 102 S.Ct. 1682 n.15; *accord, id.* at 1695-96, 1696 n.6 (Rehnquist, J. dissenting).[10]

[10] The cases concerning challenges to the validity of the census which defendants rely upon, are inapposite to an application of standing doctrine to the particular voter claims here. Plaintiffs in those actions alleged that "the votes of persons in some states or regions will be diluted in comparison to those in" other areas if the census was not performed in accordance with strict constitutional mandates. *See Fed'n for Am. Immigration Reform v. Klutznick supra*, 486 F.Supp. at 566; *Sharrow v. Brown*, 447 F.2d 94 (2d Cir. 1971), *cert. denied*, 405 U.S. 968, 92 S.Ct. 1188, 31 L.Ed.2d 243 (1972). Standing was denied in those cases because plaintiffs could not show that they were among those who had sustained the injury or that apportionment in the manner sought would redress the injury. These shortcomings were due to the unique nature of the census methods of apportionment.

"[B]ecause of the way our method of apportionment operates" it was "impossible" for plaintiffs in *Fed'n for Am. Immigration Reform* to demonstrate that concrete harm would occur from the inclusion of illegal aliens in the census count. 486 F.Supp. at 570. Assuming that such inclusion would be unconstitutional and would result in a misallocation of some Congressional seats, the court could envision no way in which individual voters could show "which

3. *Equal Protection Standing.* Plaintiffs contend that in addition to having standing based upon injuries to rights guaranteed by the establishment clause and to their right to equal participation in the electoral process, they have standing based upon injuries to rights conferred by the equal protection provisions of the fifth amendment.

states might gain and which might lose representation." *Id.* at 567-70. Plaintiffs' complaint, thus, was fatally speculative in that it could not include an allegation that any plaintiffs would be affected by the challenged government conduct. *Id.* at 570. In other words, a given voter has no standing to challenge conduct which will injure some unknown and unknowable group of voters. *See id.* at 571.

In *Sharrow*, plaintiff was faced with an exceedingly burdensome, but not impossible, pleading problem. In order to show that his injury might be redressable, he needed to perform "a state-by-state study" of the effects of the claimed impropriety in the census procedures. 447 F.2d at 97. Only such analysis could show that New York was underrepresented as alleged and without this analysis he could not "establish that the failure to enforce [Section 2 of the Fourteenth Amendment] has resulted in a detriment to his rights of representation." *Id.*

The pro-choice plaintiffs need not demonstrate that the alleged discriminatory enforcement of § 501(c)(3) has resulted or will result in a specific loss in the number of pro-choice legislators, and are likely to be injured. The *Sharrow* requirement is inapplicable they are not suing merely as members of a group, some of whom because these plaintiffs allege unequal ability to *participate* in the electoral process, not actual loss of representatives vis-a-vis other groups, and they seek a non-discriminatory enforcement of the laws, not an increase in the number of offices available. The court can act upon their injury and demands without the type of statistical information required to prove injury and to structure relief in a census case. Unlike plaintiffs in *Fed'n for Am. Immigration Reform*, these voters all allege particular personal injury. This is no general claim that the census will come out "wrong" and thus harm some voters and help others. Rather, these plaintiffs allege that *all* prochoice voters, candidates and contributors have suffered the injury complained of and will benefit from the relief requested. Assuming the truth of their pleadings, each plaintiff in this category has shown particular interests at stake and likelihood of benefiting from the relief sought.

The thrust and importance of this argument are unclear. Having satisfied the requirements for establishment clause and voter standing, plaintiffs can press their claims of illegal disparate treatment. Thus it appears that the so styled "equal protection" standing would not enhance plaintiffs' position. Moreover, plaintiffs have not alleged any facts that state an injury to rights conferred by the fifth amendment alone. They do not assert that the Code has been applied to them discriminatorily or that they have been denied some tax benefits to which they are entitled. The differential treatment of plaintiffs and the church that plaintiffs complain of creates a legally cognizable injury only in conjunction with plaintiffs' first amendment claims. Their acknowledgement that the Code has been applied properly to them concedes that they have not been injured, in purely fifth amendment terms, by the alleged misapplication to the church defendants. Viewed from this perspective, their "equal protection" claim is reduced to an assertion that the federal defendants are acting improperly. *Schlesinger v. Reservists Comm. to Stop the War, supra*, 418 U.S. at 216-22, 94 S.Ct. at 2929-2932, and *Valley Forge, supra*, 102 S.Ct. at 764 make clear that individuals without a personal stake, distinct from that of the public generally, in the government's observance of the law do not have standing to complain of government malfeasance. Merely asserting, as plaintiffs have done, that the government has disregarded the law in its treatment of a third party does not confer standing.

B. *Prudential Concerns*

The twenty individual plaintiffs and three of the organizational plaintiffs, ARM, NWHN and Nassau-NOW have satisfied the Article III requirements for voter standing. In addition, the clergy plaintiffs and the Women's Center have satisfied those constitutional prerequisites for establishment clause standing. Before a

final decision on these parties' standing can be rendered, however, they must demonstrate that the court should not decline to confer standing because of prudential considerations. The Supreme Court has identified three such prudential limitations that will defeat the standing of a plaintiff who has satisfied the Article III case or controversy requirements. Where "the harm asserted amounts only to a generalized grievance shared by a large number of citizens in a substantially equal measure," the exercise of federal jurisdiction is not warranted. *Duke Power Co. v. Carolina Env. Study Group, supra*, 438 U.S. at 80, 98 S.Ct. at 2634. Access to federal courts may be denied also when a plaintiff seeks to assert the legal rights to a third party. *Id.* Finally, the judiciary should avoid hearing "abstract questions of wide public significance [when] other governmental institutions may be more competent" to do so. *Warth v. Seldin, supra*, 422 U.S. at 500, 95 S.Ct. at 2205.[11]

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[11] Defendants suggest that as part of the prudential limits on standing plaintiffs must show that they are within the "zone of interests" that § 501(c)(3) protects. Plaintiffs fail this zone of interests test, defendants maintain, because Congress never intended § 501(c) to preserve government neutrality in the electoral process. The structure of § 501(c) creates inequality among organizations depending upon the exemption for which each qualifies. For example, § 501(c)(3) organizations enjoy tax exemptions and the right to receive tax-deductible contributions at the cost of foregoing all electioneering and limiting their lobbying efforts to an insubstantial part of their activities; § 501(c)(4) organizations are not subject to these stringent requirements but they too are ineligible for tax-deductible contributions; and § 501(c)(19) must observe few restrictions on their political endeavors while enjoying tax benefits equivalent to those conferred on § 501(c)(3) groups. Plaintiffs' standing, however, is not undermined by the fact § 501(c)(3) is not a general safeguard against tax policy induced economic distortions of the political marketplace because the zone of interests, or nexus text, applies only to taxpayer suits. *See Duke Power Co. v. Carolina Env. Study Group, supra*, 438 U.S. at 78-80, 98 S.Ct. at 2633-2634. Plaintiffs already have conceded that they do not have taxpayer standing. *See* note 1, *supra*. The failure of § 501(c) to preserve neutrality in government intervention into

These prudential factors do not dictate barring plaintiffs' opportunity to proceed with this lawsuit. Although a large number of citizens likely share the injuries alleged by the clergy under the establishment clause and by the voters and abortion rights organizations under the first and fifth Amendments, these are not "generalized grievances" such that there will by any lack of sharp controversy. Standing is not a doctrine to restrict access to the courts, and prudential concerns should not be so applied if the court is satisfied that plaintiffs bring a live and pointed controversy to it. *See, e.g., Duke Power Co. v. Carolina Env. Study Group, supra,* 438 U.S. at 80-81, 98 S.Ct. at 2634-2635 ("Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested" prudential concerns generally do not bar standing); *United States v. SCRAP, supra,* 412 U.S. at 687-88, 93 S.Ct. at 2415-2416 ("standing is not to be denied simply because many people suffer the same injury.") Standing rules should be invoked to ensure that the court will adjudicate only an actual case or controversy and that, as an adversarial rather than an inquisitorial tribunal, it will be fully apprised of the facts and relevant law by a vigorous and interested presentation from the litigants. There is not the slightest reason to believe that the wide dispersion of plaintiffs' injuries will diffuse the contest before the court.

The prudential limitation on standing when rights of third parties are implicated avoids "adjudication of rights which those not before the Court may not wish to assert . . . [and assures] that the most effective advocate of the rights at issue is present to champion them. *See Singleton v. Wulff,* 428 U.S. 106, 113-14, 96 S.Ct. 2868,

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the political process has caused the United States Court of Appeals for the District of Columbia Circuit to declare the statutory scheme in violation of the Constitution. *See Taxation with Representation of Washington v. Regan,* 676 F.2d 715 (D.C. Cir. 1982) (en banc).

2873-2874, 49 L.Ed.2d 826 (1976)." *Duke Power Co. v. Carolina Env. Study Group, supra,* 438 U.S. at 80, 98 S.Ct. at 2634. This lawsuit does not present the potential problem of a disinterested plaintiff advocating the interests of persons not before the court. Plaintiffs do not predicate their standing on the narrow *jus tertii* exceptions to the general rule that litigants must assert their own rights. The action, therefore, involves no rights that the rightholder would not wish to assert or that the plaintiffs are likely not to press vigorously.

The final prudential hurdle restricts access to judicial forums to resolve abstract policy questions of broad public importance. Courts erect this barrier from their awareness of the judiciary's limited competence to resolve societal, as opposed to personal, disputes and the superiority of other mechanisms to make complex social choices. Not all issues of broad public importance, however, are necessarily, or even better, left to the executive and the legislature. Plaintiffs do not seek resolution of "abstract questions;" they have articulated particular improper actions by the church defendants and illegal and unconstitutional disregard for that activity by the government defendants. Although the complaint implicates social policy issues, it does not call for judicial selection of an appropriate policy. Congress already has made that choice and set out the correct policy in § 501(c)(3); plaintiffs ask only for a judicial determination of whether defendants have observed Congress's commands concerning paying taxes and engaging in political activity. The prudential barriers do not restrict a court from adjudicating such a claim merely because of the interplay between the litigation and social controversy.

III

Defendants urge dismissal, even if plaintiffs do have standing, because the complaint does not state a claim upon which relief may be granted. Defendants contend

that plaintiffs' injuries, such as they are, do not amount to actionable wrongs either as establishment of religion or unconstitutional vote dilution. The church defendants further argue that regardless of the vitality of the complaint, it states no claim against them and that, therefore, they should be dismissed.

Plaintiffs are permitted to proceed "unless it appears beyond doubt that [they] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). Measured by this standard, counts two and three of the complaint certainly are adequate and the motion to dismiss them for failure to state a claim must be denied. Counts one and five, however, are fatally defective and must be dismissed. Plaintiffs have voluntarily withdrawn count four.

In count two of the amended complaint, plaintiffs allege that by granting the Roman Catholic Church a uniquely favored status under the tax code, the government defendants have violated their duty, arising under the first amendment, to treat all religious organizations similarly. In recent years, the Supreme Court has set out a three part test to determine establishment clause violations. A challenged government action withstands establishment clause scrutiny "if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion." *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 653, 100 S.Ct. 840, 844, 63 L.Ed.2d 94 (1980); *accord, Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111-2112, 29 L.Ed.2d 745 (1971); *Brandon v. Bd. of Education*, 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, —— U.S. ——, 102 S.Ct. 970, 71 L.Ed.2d 109 (1982).

It is not implausible that plaintiffs will be able to adduce facts that demonstrate that the government favoritism allegedly shown to the defendants lacks secular purpose or that this preferential treatment advances the cause of the Roman Catholic Church. If plaintiffs are successful in either of these tasks, they will have demonstrated an actionable establishment clause violation. The difficult evidentiary burdens that plaintiff must shoulder to prove these allegations do not, by themselves, justify dismissal.[12]

Defendants place undue reliance on *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), in their argument that the tax benefits plaintiffs complain of do not rise to the level of actionable injuries. In *Walz*, there was no assertion of preferential treatment of one religion to the detriment of others. *See id.* at 673, 90 S.Ct. at 1413; *id.* at 689, 90 S.Ct. at 1421 (Brennan, J., concurring); *id.* at 696, 90 S.Ct. at 1425 (Harlan, J., concurring). The dictum, "[t]here is no genuine nexus between tax exemption and establishment of religion[,]" *id.* at 675, 90 S.Ct. at 1414, and the accompanying distinction between the transfer of funds to churches and abstaining from collecting taxes from them, *id.* at 674-75, 90 S.Ct. at 1414-1415, are applicable only in the context of a nondiscriminatory tax deduction extended broadly to social welfare organizations. In that circumstance, the state, by declining tax collection from all churches, observes the "wholesome neutrality" commanded by the establishment clause; taxing church property or income while all other private corporations operated for the public benefit were granted an exemption would constitute hostility to religion that the first amendment forbids. *Walz v. Tax Comm'n of the City of New York, supra*, 397 U.S. at 696-97, 90 S.Ct. at

[12] The neutrality of the statute itself, of course, does not immunize defendants if they apply that statute in a manner that favors one religion over all others. *See, e.g., Fowler v. Rhode Island*, 345 U.S. 67, 69, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 271-73, 71 S.Ct. 325, 327-328, 95 L.Ed. 267 (1951).

1425-1426 (Harlan, J., concurring). When, as here, the government conditions that tax advantage on abstinence from the political arena, but waives that condition for a single religious group, the waiver, rather than the exemption itself, runs afoul of the constitution. Even if the "tax subsidy" granted through § 501(c)(3) is not establishment *per se*, the preferential treatment shown to one religious group carries the appearance of an improper endorsement of sectarian belief.

In count three, plaintiffs allege a violation of their fifth amendment rights to due process, including equal protection of the law, by the government defendants' failure to revoke the church's § 501(c)(3) status. The gravamen of this claim is the adverse impact on the plaintiff's political voice that results from the government's financial sponsorship of the plaintiffs' opponents in a bitter public controversy. *Baker v. Carr*, *supra*, and it progeny confirmed that individuals have a right to equal participation in the electoral process and to be free from arbitrary government action that favors the political strength of some persons relative to others. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 554-68, 84 S.Ct. 1362, 1377-1384, 12 L.Ed.2d 506 (1964); *Shakman v. Democratic Organization of Cook County*, *supra*, 435 F.2d at 270; *Tax Analysts and Advocates v. Simon*, *supra*, 376 F.Supp. at 899. The defendants concede the existence of this right, but they argue that it is limited to protection against mathematical dilution of the vote. This reiteration of the argument made against the plaintiffs' claim of voter standing fails for the reasons similar to those found to support that standing. *See* pp. 480-483, *supra*. The *Baker* opinion evinces no indication that the right it recognized is factbound to the circumstances of the case. If the plaintiffs can prove that the government defendants have conferred a financial benefit on the church and that the benefit disadvantages the plaintiffs in electoral contests, then the plaintiffs will have made a prima facie case for relief. Congress is not free to subsidize the lobbying or elec-

tioneering activities of one group while arbitrarily denying the subsidy to others. *Taxation with Representation of Washington v. Regan*, *supra*, at 716. Similarly, the administrators of our laws are not free to condition the grant of a subsidy upon total abstinence from campaigning and minimal engagement in lobbying and then, without reason, to exempt one group from that requirement while allowing it the subsidy.[13]

In count five, plaintiffs seek a writ of mandamus to compel the government defendants to enforce the Code against the church defendants. It is firmly established that ordinarily mandamus relief is available only to compel ministerial administrative actions. *See e.g., Leonhard v. Mitchell*, 473 F.2d 709, 712-13 (2d Cir.), *cert. denied*, 412 U.S. 949, 93 S.Ct. 3011, 37 L.Ed.2d 1002 (1973); *Lovallo v. Froehlke*, 468 F.2d 340, 343, 345-46 (2d Cir. 1972), *cert. denied*, 411 U.S. 918, 93 S.Ct. 1555, 36 L.Ed. 2d 310 (1973). It is equally accepted that discretion permeates IRS tax assessment and collection decisions. *See e.g., Bob Jones Univ. v. Simon*, 416 U.S. 725, 749-50, 94 S.Ct. 2038, 2052-2053, 40 L.Ed.2d 496 (1974); *American Ass'n of Commodity Traders v. Dep't of Treasury*, 598 F.2d 1233, 1235 (1st Cir. 1979). Accordingly, mandamus is an inappropriate remedy in this action.

Count one states simply that "[t]he activities of the Roman Catholic Church violate § 501(c)(3) of the Code and the First Amendment to the Constitution." This count fails to state a claim against the church defendants because they are incapable of violating the first amendment and they have breached no duty imposed by the Code and to plaintiffs.

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[13] The court makes no judgment at this time on the appropriate standard of review for these claims. The Court of Appeals for the District of Columbia Circuit recently applied the strict scrutiny test to claims, analogous to those at bar, that § 501(c) of the Code facilitated the speech of some persons over others. *See Taxation with Representation of Washington v. Regan*, *supra*, at 723-731.

The constitutional prohibition against establishment of religion prohibits government activities that enhance the status of one theology over all others or the status of religious beliefs and organizations generally over non-religion. Like all other protections afforded by the Bill of Rights, this stricture does not restrict purely private corporate action. Admittedly, the line between the public and the private is indistinct and, some say, vanishing, but the activities of the Roman Catholic Church, as alleged in the amended complaint, do not even approach this disputed border. Therefore, no action can proceed against the church defendants based on their abridgement of plaintiffs' first amendment, guaranteed rights.

The complaint also fails to state a violation of § 501 (c) (3) by the church defendants. They have received a determination letter from the IRS that confirms their tax-exempt status. Even if, as plaintiffs contend, that letter was erroneously or illegally issued, the church is entitled to rely upon it and withhold payment of taxes. The Code imposes no duty upon the church to gain pre-clearance from the IRS before embarking on activities that might trench upon the § 501(c)(3) prohibitions against political activity. If the church does engage in these proscribed endeavors, then it is liable to revocation of its exemption, but as long as it holds that exemption, it cannot be said to have violated the Code.

Moreover, the plaintiffs, by their own admission, have no direct grievance with the church defendants. The injuries set out in the complaint arise from illegal and unconstitutional government action. Plaintiffs concede that they do not seek to terminate the Roman Catholic Church's political program; they desire to place the church on an equal footing with themselves in the political battle over the right to choose to have an abortion. The disadvantage plaintiffs suffer comes from government indifference to church excesses and it is against the government, not the church, that plaintiffs have stated a claim.

IV

Defendants' final assault on the action flows from statutory and common law prescriptions against judicial review of plaintiffs' claims. Defendants contend that the doctrine of non-reviewability of certain administrative or prosecutorial decisions precludes consideration of the action. In addition, defendants maintain that Congress has explicitly excluded lawsuits such as this from those in which injunctive or declaratory relief is available.

A. *Reviewability of Administrative or Prosecutorial Discretion*

As a general rule, courts will review administrative actions in the absence of a clear and convincing showing of contrary legislative intent. *Eastern Ky. Welfare Rights Organization v. Simon*, 506 F.2d 1278, 1285 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Medical Comm. for Human Rights v. Sec. & Exch. Comm'n*, 432 F.2d 659, 666 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972), *citing Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1510, 18 L.Ed.2d 681 (1967). Tempering this presumption is the recognition of a generous grant of discretion to the executive, particularly in decisions to prosecute law violators. *See, e.g., Marshall v. Jerrico*, 446 U.S. 238, 248, 100 S.Ct. 1610, 1616, 64 L.Ed.2d 182 (1980); *United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974); *Kixmiller v. Sec. & Exch. Comm'n*, 492 F.2d 641, 645 (D.C. Cir.) (1974).

This action fits much more closely within the rule allowing review than the rule excluding it. No statute explicitly bars all judicial review of IRS decisions concerning taxpayer status.[14] To the contrary, Congress re-

[14] As discussed *infra*, pp. 489-90, the Anti-Injunction Act, 26 U.S.C. § 7421(a) (1976), and the Declaratory Judgment Act, 28

cently added to the Code a section explicitly permitting judicial review of IRS decisions denying an organization § 501(c)(3) status. *See* Pub. L. 94-455, Title XII, § 1203(b)(2)(A), 90 Stat. 1690 (1976), codified at 26 U.S.C. § 7428 (1976).[15] The jurisdictional restrictions contained in this section of the Code—limiting § 7428 suits to taxpayer actions for declaratory relief—do not undermine the inference that Congress recognizes the *competence* of the judiciary to reevaluate and where necessary to supervise IRS decisions concerning the award of § 501(c)(3) status. There is no significant difference in the decisional task presented to the courts in determining whether an organization has improperly been denied an exemption and in determining whether it has improperly been granted one. Both decisions require consideration of complex federal revenue collection policies. Both require delving into the nature of the taxpayer, its expenditures and its activities. Neither is susceptible to simple application of rules to facts.

Defendants place undue reliance on the doctrine of non-reviewable prosecutorial discretion. Their most compelling argument draws upon the deference courts show to executive decisions to allocate law enforceemnt resources in a manner that the executive deems most efficacious. Offsetting this resource efficiency argument, however, is the consistent judicial intervention into prosecutorial decisions that fail "to promote the ends of justice and den[y] rights conferred upon a citizen by the Constitution and by federal law." *NAACP v. Levi*, 418 F. Supp. 1109, 1116 (D.D.C. 1976); *see Nader v. Saxbe*,

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U.S.C. § 2201 (Supp. IV 1980) restrict the scope of remedies available in tax related controversies. Neither of these statutes, however, can be construed as a blanket preemption of judicial review of taxpayer status. They are limitations on remedies only.

[15] Section 7428 authorizes certain organizations whose application for tax-exempt status is denied or revoked to bring an action for judicial declaration of the organization's entitlement to the exemption. *See* 26 U.S.C. § 7428 (1976).

497 F.2d 676, 679 n.19 (D.C. Cir. 1974); *Adams v. Richardson*, 480 F.2d 1159, 1166 (D.C. Cir. 1973). Moreover, this action is distinguishable from the ordinary instance of unreviewable prosecutorial discretion where the executive must choose from among many malfeasors those against whom it will enforce the law. Here, by contrast, the plaintiffs seek to compel the government to conform its actions to the law. They do not sue, for example, under a statute that criminalizes certain private behavior nor do they complain that the executive has failed to penalize a third party's violation of that statute. Rather plaintiffs allege that the IRS has illegally acted to bestow a tax benefit upon an unqualified organization. Plaintiffs do not seek to force the executive to expend its resources to prosecute a law violator; they are using their own resources to compel the government defendants to observe Congressionally and constitutionally imposed strictures on defendants' official actions. In sum, this case presents almost none of the circumstances that give rise to judicial deference to prosecutorial discretion.

B. *The Anti-Injunction Act*

The Code expressly prohibits, with certain exceptions not relevant here, all "suit[s] for the purpose of restraining the assessment or collection of any tax . . ." 26 U.S.C. § 7421(a) (1976). Defendants contend that this litigation falls within the prohibited category.

Reference to the words of the statute alone places plaintiffs' case beyond its purview. The complaint seeks an injunction commanding, not forbidding, the collection of taxes. Peering behind the words provides no greater support for defendants' position.

This section of the Code, known as the Anti-Injunction Act, apparently has no recorded legislative history. *Bob Jones Univ. v. Simon, supra*, 416 U.S. at 736, 94 S.Ct. at 2045. Courts have interpreted the statute as ". . . the protection of the Government's need to assess and collect

taxes as expeditiously as possible with a minimum of preenforcement judicial interference . . ." *Id.; see Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 82 S.Ct. 1125, 1129, 8 L.Ed.2d 292 (1962). Defendants argue that this government need to ensure an unimpeded flow of revenue can be frustrated by suits, such as the case at bar, that challenge taxpayer status and compel tax collection because such suits place demands upon the IRS equivalent to actions to restrain collection. This argument is not without some merit, particularly because a successful third party action compelling tax assessment will likely be followed by a taxpayer suit under 26 U.S.C. § 7428 seeking a declaration of entitlement to an exemption. Such litigation over the right of an organization to enjoin certain privileges under the Code has the potential to encumber substantial IRS resources even if it does not directly interfere with the flow of revenue.

The majority of the courts that have considered the scope of the Anti-Injunction Act, however, have declined to interpret its prohibitions as broadly as defendants suggest. The consistent theme in these decisions is that the statute only extends to those actions it expressly refers to and that its effect is to require that taxpayers who object to the payment of taxes pay the assessment and sue for a refund. *See, e.g., Wright v. Regan*, 656 F.2d 820, 836 n.52 (D.C. Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3467 (Dec. 12, 1981) (No. 81-970); *Tax Analysts and Advocates v. Shultz, supra*, 376 F. Supp. at 891-92; *Eastern Ky. Welfare Rights Organization, supra*, 506 F.2d at 1284; *McGlotten v. Connally*, 338 F. Supp. 448, 453-54 (D.D.C. 1972) (three judge court). Persuasive reasoning supports these decisions. Third party suits to compel tax collection as a means to vindicate plaintiffs' rights do not pose the threat of clogging the federal revenue pipeline that taxpayer-sought injunctions would present because third party suits are " 'few and far between[.]' " *Wright v. Regan*,

supra, 656 F.2d at 836 n.52. The Anti-Injunction Act would have a draconian effect beyond what Congress explicitly required if it were applied in these circumstances because it would foreclose any relief to third parties injured by executive decisions not to assess or collect taxes. The taxpayer who is unable to prevent collection because of the Act has open to it an alternative avenue of relief —a suit for refund. Plaintiffs here, and any person having a right to complain of another's lack of tax liabilities, by contrast, would have no means of redress if the Act preempted this lawsuit. *See Bob Jones Univ. v. Simon, supra*, 416 U.S. at 746, 94 S.Ct. at 2050; *National Restaurant Ass'n v. Simon*, 411 F. Supp. 993, 996 (D.D.C. 1976); *McGlotten v. Connally, supra*, 338 F. Supp. at 453-54. In light of the clear language of the statute and the strong and compelling authority limiting application of the statute to actions to restrain tax collection, plaintiffs are not barred from proceeding by the Anti-Injunction Act.

C. *The Declaratory Judgment Act*

In addition to their prayer for an injunction, plaintiffs seek a declaration that defendants have violated the Code and Constitution. The Declaratory Judgment Act confers jurisdiction on the court to issue such relief "except with respect to [controversies concerning] Federal taxes other than the actions brought under Section 7428 of the Internal Revenue Code of 1954, . . ." 28 U.S.C. § 2201 (Supp. IV 1980).

Conceding that they cannot bring a § 7428 action, plaintiffs change hats from those of the strict constructionists who advocated a literal reading of the Anti-Injunction Act to those of contextualists who argue that that statute and the Declaratory Judgment Act share the same purpose and thus should be interpreted to be coextensive. Plaintiffs' only support for this proposition is dicta from several opinions that interpreted the two

laws as "coterminous." *McGlotten v. Connally, supra,* 338 F. Supp. at 453; *see Bob Jones Univ. v. Simon, supra,* 416 U.S. at 733 n.7, 94 S.Ct. at 2044 n.7 (Declaratory Judgment Act restriction is "at least as broad as the Anti-Injunction Act"). Plaintiffs' authorities do not support the broad proposition that any tax case ripe for injunctive relief also is ripe for declaratory relief; those cases stated only that it appeared that Congress intended to exclude from the Declaratory Judgment Act *at least* those cases, other than § 7428 actions, that could not be brought because of the Anti-Injunction Act. *See Bob Jones Univ. v. Simon, supra,* 416 U.S. at 733 n.7, 94 S.Ct. at 2044 n.7.

Declaratory relief and injunctive relief are two different forms of the courts' remedial powers; there is no inherent reason that the two should be interpreted as equal in scope. Congress extended the Declaratory Judgment Act and created the § 7428 remedy in response to the *Bob Jones Univ.* decision. *See* S. Rep. No. 94-938, 94th Cong., 2d Sess. 586-87, *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 4010-11. Nothing in the wording that Congress chose to allow these taxpayer suits for a declaration of a right to § 501(c)(3) status indicates that it desired to define the scope of the available remedy in terms of judicially recognized exemptions to the Anti-Injunction Act. The different purposes of the declaratory and injunctive remedies—the former allows a litigant to seek an order from the court before subjecting itself to liability, for example, by not paying taxes, while the latter more often is invoked to terminate ongoing injurious activity—suggests that the absence of cross-references between the Declaratory Judgment and Anti-Injunction Acts resulted from a conscious tailoring of each to the circumstances Congress thought most befitting. The Anti-Injunction Act, by its narrow wording, permits suits to compel collection of taxes; such suits will be brought by parties whose tax status is not in dispute in the litigation and who, as plaintiffs here,

can have standing only if they can show that a third party's privileged tax status imposes on them a discrete and palpable injury. At that point the opportunity for a declaration of rights would be surplusage. The party seeking to adjudicate its own tax status presents a very different injury, the denial of an exemption from future taxation. A declaration of its right to the exemption can prevent it from suffering any permanent damage, but allowing such a party to seek an injunction would interrupt collection of federal revenues and thereby promote the principal mischief Congress sought to prevent through the Anti-Injunction Act. This analysis supports defendants' position that no declaratory relief is available to plaintiffs.

V

Pursuant to the preceding discussion, the motion to dismiss is granted in part and denied in part. The church defendants motion to dismiss themselves from the lawsuit is granted. Plaintiffs Laurel Clinic, Inc., The Federation of Feminist Women's Health Center, Inc., Harrisburg Reproductive Health Services, Inc., Hagerstown Reproductive Health Services, Inc., and Women's Health Services, Inc. are dismissed for lack of standing. The motions to dismiss the other plaintiffs are denied. The twenty individual plaintiffs have standing as voters to contest the alleged infringement of their right to participate in the political process on equal terms with all others and free from arbitrary government interference. ARM, Nassau-NOW, and the National Women's Health Network, Inc. have standing to represent their voter-members injured by the challenged government conduct. In addition, the clergy plaintiffs and the Women's Center for Reproductive Health have satisfied the requirements to bring an action complaining of an unconstitutional establishment of religion. The motions to dismiss for failure to state a claim upon which relief may be granted or because the action is barred by the Anti-

Injunction Act or the doctrine of administrative discretion are denied. The court finds that the Declaratory Judgment Act does not authorize relief in this action.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 80 Civ. 5590 (RLC)

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY,
AND ROSCOE L. EGGER, JR.,
COMMISSIONER OF INTERNAL REVENUE

Feb. 27, 1985

OPINION

ROBERT L. CARTER, District Judge.

This renewed motion to dismiss the amended complaint for lack of subject matter jurisdiction is based upon the recent Supreme Court decision in *Allen* v. *Wright*, —— U.S. ——, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The question presented is whether and to what extent the *Allen* opinion affects the outcome reached by the court in *Abortion Rights Mobilization, Inc.* v. *Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982) (Carter, J.) (*"ARM"*), with which familiarity is assumed. *ARM* held that the clergy plaintiffs and the Women's Center for Reproductive Health had standing under the establishment clause, and

that 20 individuals and three tax-exempt organizations had standing as voters in this litigation.[1]

The Supreme Court held in *Allen* that a nationwide class of parents of black children attending public schools in districts undergoing desegregation, but who had not actually been denied entry to allegedly discriminatory private schools, did not have standing to challenge the tax exempt status of those schools.

In applying *Allen* to the present case it must first be noted that the Court did not close the door on private suits challenging government grants of tax exemption, *see Allen*, 104 S.Ct. at 3332 (noting possible propriety of standing in *Coit v. Green*, 404 U.S. 997, 92 S.Ct. 564, 30 L.Ed.2d 550 (1971), *summarily aff'g. sub nom., Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), which made allegations comparable to those in *Allen* but with different facts), but used traditional analysis in concluding that the *Allen* plaintiffs lacked standing.

The Court held that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen*, 104 S.Ct. at 3325. This is an integral part of the precedent upon which both *Allen* and *ARM* were decided. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476, 102 S.Ct. 752, 757-761, 70 L.Ed.2d 700 (1982); *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975). Separation of powers, as *Allen*, 104 S.Ct. at 3330 n.26, clearly demonstrates, is not a distinct line of analysis but serves as the basis of the "traceability" part of the traditional

[1] As a further result of *ARM*, five of the original plaintiffs, all abortion clinics, were denied standing for failure to show injury in fact and two of the original defendants, the United States Catholic Conference and the National Conference of Catholic Bishops, had the complaint against them dismissed since they were incapable of violating the First Amendment and had not violated the Internal Revenue Code in light of an explicit tax exemption from the IRS.

three part standing test of personal injury fairly traceable to the defendants allegedly illegal conduct which is likely to be remedied by the requested relief. *Id.* at 3325.[2]

More specifically, plaintiffs in *Allen* asserted two types of damage: the first was characterized as either a generalized injury based upon the government's behavior in granting tax exemptions to the schools or as denigration suffered by all blacks as a result of government discrimination. In either case, the Court found the harm to be insufficiently personal to constitute a justiciable cognizable injury. *Id.* at 3326. The second alleged injury was the children's diminished ability to receive an education in a racially integrated school. *Id.* at 3328. This was found wanting because desegregated schooling was not fairly traceable to the allegedly illegal conduct of the IRS. *Id.* at 3326.

A

While it is clear that stigmatizing injuries are the sort of noneconomic wrongs caused by government conduct that sometimes can be sufficient to support standing, *Heckler v. Mathews*, 465 U.S. ——, ——, 104 S.Ct. 1387, 1395, 79 L.Ed.2d 646 (1984), such status is accorded only to those who can allege a resultant harm to a concrete, personal interest. *Allen*, 104 S.Ct. at 3327-328. The *ARM* decision used this analysis to find that the lay and organizational plaintiffs did not have standing while the clergy plaintiffs and the Women's Center for Reproductive Health, a church affiliated guidance service, asserted a "compelling and personalized" injury, *ARM*, 544 F.Supp. at 479, that "diminishes their position in the

[2] While the "fairly traceable" and "redressability" components of the constitutional standing inquiry were initially articulated as two facets of a single causation requirement, both *Allen* and *ARM* treat them as distinct inquiries for analytical purposes. *Allen*, 104 S.Ct. at 3326 n.19; *ARM*, 544 F.Supp. at 478. The same practice will be followed here.

community, encumbers their calling in life, and obstructs their ability to communicate effectively their religious message." *Id.* at 480. Such allegations meet the test enunciated in *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), that would-be plaintiffs must show that they are "directly affected by the laws and practices against which their complaints are directed." *Id.* at 224 n.9, 83 S.Ct. at 1572 n.9.

Personal injury, however, is not enough. Plaintiffs must also clear the two additional hurdles of the standing test. This court in *ARM*, found plaintiffs' establishment clause injury to be traceable to defendants' conduct because "[t]acit government endorsement of the Roman Catholic Church view of abortion hampers and frustrates these plaintiffs' ministries." *Id.* at 480. The court therefore found plaintiffs' asserted injuries to be traceable to "official approval of an orthodoxy antithetical to [plaintiffs'] spiritual mission." *Id.*

> Their injury flows directly from the federal defendants allowing the church defendants the privilege of retaining § 501(c)(3) status while electioneering and denying this privilege to other religious organizations. The granting of a uniquely favored tax status to one religious entity is an unequivocal statement of preference that gilds the image of that religion and tarnishes all others. A decree ordering the termination of this illegal practice and restoring all sects to equal footing will redress this injury.

Id.

This finding is consistent with *Allen*. *Alien* holds that tax exemption granted to an organization that allegedly practices an illegal activity does not in itself constitute the necessary connection between government action and injuries that flow from the activity. The lack of desegregated schooling, defined in *Allen* as a cognizable injury, was not found directly traceable to government action.

"From the perspective of the IRS, the injury to respondents is highly indirect and 'results from the independent action of some third party [i.e., the discriminatory private school] not before the court.'" *Allen*, 104 S.Ct. at 3328, quoting, in part, *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). The Court stated that if a direct link between tax exemption and desegregation could be established, i.e., if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration, then the alleged injury would be fairly traceable to unlawful IRS grants of tax exemptions. *Allen*, 104 S.Ct. at 3328.

Similarly, redress of the establishment clause injury sustained in *ARM* does not depend upon any action by a third party. Redress will come directly from the government's consistent enforcement of the tax laws, not from any change in the political activities of the Church. Plaintiffs' establishment clause injury centers on the quasi-official imprimatur accorded the anti-abortion activities of the Church through tax exemptions and the restrictions placed on the establishment clause plaintiffs' political activities by § 501(c)(3). Whether the allegations can be proved is not a question for this court now to decide since it must accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979).

It is thus apparent that *Allen* supports the court's earlier decision which denied standing under the establishment clause to those plaintiffs who, similar to those in *Allen*, asserted only general claims of denigration, but which granted standing to those plaintiffs who could pass the three part test of distinct personal injury, direct traceability, and possible redress by defendants.

B

As pointed out in the earlier opinion, it has consistently been held that voters have standing to contest the alleged infringement of their right to participate in the political process on equal terms with all others free from arbitrary government interference. *ARM*, 544 F.Supp. at 480-481 citing *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (plaintiffs' unjustifiable inequality vis-a-vis voters in other counties justified standing); *Shakman v. Democratic Organization of Cook County*, 481 F.Supp. 1315 (N.D.Ill.1979) (standing granted to challenge patronage system because of the alleged injury to plaintiffs' interest in an equal chance and an equal voice in the election process); *Tax Analysts and Advocates v. Shultz*, 376 F.Supp. 889 (D.D.C. 1974) (non-profit corporation and one of its members granted standing to challenge revenue ruling concerning campaign gifts because alleged diminution of one's vote and dilution of the ability to affect the electoral process are judicially recognized wrongs and are thus sufficient allegations of actual injury); *Common Cause v. Democratic National Committee*, 333 F.Supp. 803 (D.D.C.1971) (allegations that several national committees of political parties circumvented the statute placing limits on individual campaign contributions, thereby diluting plaintiffs' participation in the voting process, were sufficient to find standing).

Here again, mere personal injury is not enough. Defendants argue that *Allen's* yardstick in regard to traceability and redressability require that voter standing be denied in this case. Defendants, however, misconstrue the basis for the *ARM* holding that voter standing requirements have been met. The injury to plaintiffs is not, as defendants state, "alleged politicking by the Catholic Church." *Defendants' Memorandum of Law in Support of Their Renewed Motion to Dismiss* at 15, but the alleged arbitrary inequality of the plaintiffs in the political

process vis-a-vis the Catholic Church created by the IRS's grant of tax exemption to the latter. The judicially cognizable injury in *Allen* was segregated schooling which was neither created nor remediable by IRS action alone. The injury alleged in *ARM* is unequal footing in the political arena, a condition completely traceable and within the control of the IRS. The *Allen* analysis and *ARM*'s are, therefore, as one and the court's earlier holding granting standing to the present plaintiffs remains unaffected by *Allen*.

C

Moreover, in *ARM*, the successful plaintiffs were found to have surmounted the three prudential limitations that can defeat standing even when the Article III case or controversy standards are met. *ARM*, 544 F.Supp. at 484. The three prudential limitations preclude standing when: (1) the harm asserted amounts to only a generalized grievance shared by a large number of citizens in a substantially equal measure, (2) plaintiffs assert the rights of third parties, or (3) abstract questions of wide public significance are presented when other governmental institutions may be more competent to decide them.[3] *Id.* (citations omitted). *Allen* does not reach these issues, but its analysis is fully congruent with *ARM*'s treatment of these considerations.

Concerning the "generalized grievance" limitation, *ARM* full analyzed the specificity of the remaining plaintiffs' injuries, distinguishing the harm to clergy plaintiffs and the Women's Center for Reproductive Health from that complained of by the excluded plaintiffs as well as plaintiffs in, *e.g.*, *Valley Forge Christian College v. Amer-*

[3] The "zone of interests" test was held to be inapplicable to the *ARM* context since that test applies only to taxpayer suits and plaintiffs concede that they do not have taxpayer standing. *ARM*, 544 F.Supp. at 484 n.11; *see Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78-79, 98 S.Ct. 2620, 2633-2634, 57 L.Ed.2d 595 (1978).

icans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S.Ct. 752, L.Ed.2d 700 (1982). *ARM*, 544 F.Supp. at 4477-480, 484. Voter standing is also particularized since plaintiffs, despite articulated desires to be politically active on behalf of their pro-choice views, can not do so without risking their valuable § 501(c)(3) status. This personal denial of equal treatment is precisely the type of standing required by *Allen* since parent plaintiffs in that case "were not personally denied equal treatment by the challenged discriminatory conduct." *Allen*, 104 S.Ct. at 3327.

The question of whether plaintiffs are addressing other parties' rights was answered squarely in the negative by *ARM*, 544 S.Supp. at 485. Since no assertion otherwise is made by defendants and *Allen* is silent on the issue, the previous ruling need not be disturbed.

Finally, there is the matter of whether other governmental institutions may be more competent to decide this issue. As stated in *Allen* and noted in defendants' briefs, the separation of powers doctrine.

> counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch and not to the Judicial Branch the duty to 'take care that the laws be faithfully executed.' U.S. Const. Art. II, § 3. We could not recognize [plaintiffs'] standing in this case without running afoul of the structural principle.[26]

---

[26] . . . [O]ur analysis of this case does not rest on the more general proposition that no consequence of the allocation of administrative enforcement resources is judicially cognizable. . . . Rather we rely on separation of powers principles to interpret the 'fairly traceable' component of the standing requirement.

Allen, 104 S.Ct. at 3330.

Whether courts provide an appropriate forum for deciding the matter presented thus implicates questions considered in the Article III analysis. This dovetailing of constitutional and prudential concerns was explicitly recognized by *Allen*:

> Case or controversy considerations, the Court observed in *O'Shea v. Littleton*, . . . 414 U.S. [488,] 499, 94 S.Ct. [669], 677[, 38 L.Ed.2d 674 (1974),] 'obviously shade into those determining whether the complaint states a sound basis for equitable relief.' . . . Most relevant to this case is the principle articulated in *Rizzio v. Goode* . . . 423 U.S. [362,] 378-379, 96 S.Ct. [598,] 607-608[, 46 L.Ed.2d 561 (1976)]:
>
> 'When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs,' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896[, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230] (1961), quoted in *Sampson v. Murray*, 415 U.S. 61, 83[, 94 S.Ct. 937, 949, 39 L.Ed.2d 166] (1974). *Id.*

In addition to the previously discussed finding of direct harm to plaintiffs and its traceability to defendants' actions, *ARM* further addressed this final prudential concern of limiting judicial activity to the enforcement of "specific legal obligations whose violation works a direct harm," *Allen*, 104 S.Ct. at 3330, by holding that:

> Although the complaint implicates social policy issues, it does not call for judicial selection of an appropriate policy. Congress has already made that choice and set out the correct policy in § 501(c)(3); plaintiffs ask only for a judicial determination of whether defendants have observed Congress' commands concerning taxes and engaging in political ac-

tivity. The prudential barriers do not restrict a court from adjudicating a claim merely because of the interplay between the litigation and social controversy.

ARM, 554 F.Supp. at 485

For the above stated reasons, defendants' renewed motion to dismiss the amended complaint for lack of subject matter jurisdiction is denied.

IT IS SO ORDERED.

APPENDIX F

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 30th day of July one thousand nine hundred and eighty-seven.

Docket No. 86-6092

IN RE UNITED STATES CATHOLIC CONFERENCE and
NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Appellants,

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Plaintiffs-Appellees,
v.

JAMES A. BAKER, III, Secretary of the Treasury, and
ROSCOE L. EGGER, JR., Commissioner of Internal Revenue,
Defendants.

[Filed July 30, 1987]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, In Re United States Catholic Conference and National Conference of Catholic Bishops

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 86-6092

IN RE UNITED STATES CATHOLIC CONFERENCE

NOTICE OF MOTION
FOR STAY OF THIS COURT'S MANDATE

[Filed June 18, 1987]

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Charles H. Wilson
Williams & Connolly
839 Seventeenth Street, N.W.
Washington, D.C. 20006

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Marshall Beil
19th West 44th Street
Suite 711
New York, New York 10036

Has consent of opposing counsel:

A. been sought?	☒ Yes	☐ No
B. been obtained?	☐ Yes	☒ No
Has service been effected?	☒ Yes	☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☒ No
B. by firm date of argument notice? ☐ Yes ☒ No
C. If Yes, enter date: ———————

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL N/A

Has request for relief been made below: ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed: Judge Robert L. Carter

Brief statement of the relief requested: A further stay of civil contempt sanctions imposed by the District Court pending petition for, and final disposition, of a writ of certiorari, in the event movants' petition for rehearing is denied.

Complete Page 2 of This Form

By: *(Signature of attorney)*

/s/ Charles H. Wilson
Signed name must be printed beneath

/s/ CHARLES H. WILSON

Appearing for: *(Name of party)*

U.S. Catholic Conf.

Date

June 18, 1987

[Appellant] or Petitioner:

☐ Plaintiff ☐ Defendant

Appellee or Respondent:

☐ Plaintiff ☐ Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

[Filed Jul. 30, 1987]

/s/ Jon O. Newman

/s/ Amalya L. Kearse
(per J.O.N.)

/s/ Richard J. Cardamone
(per J.O.N.)

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 86-6092

IN RE U.S. CATHOLIC CONFERENCE

NOTICE OF MOTION
FOR FURTHER STAY PENDING
PETITION FOR CERTIORARI

[Filed Aug. 14, 1987]

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Charles H. Wilson
Williams & Connolly
839 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 331-5067

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Marshall Beil
19 West 44th Street
Suite 711
New York, New York 10036
(212) 575-8500

Has consent of opposing counsel:

A. been sought?	☒ Yes	☐ No
B. been obtained?	☒ Yes	☐ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order?
B. by firm date of argument notice? ☐ Yes ☐ No
C. If Yes, enter date: N/A

EMERGENGY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8) N/A

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No
N/A

If No, explain why not:

Case already decided

Will the parties agree to maintain the status quo until the motion is heard? ☒ Yes ☐ No

Judge or agency whose order is being appealed: Judge Robert L. Carter

Brief statement of the relief requested: Extension of stay of mandate for an additional two weeks to permit appellants to present petition for certiorari to the Supreme Court.

Complete Page 2 of This Form

By: *(Signature of attorney)*

/s/ Charles H. Wilson
Signed name must be printed beneath

CHARLES H. WILSON

Appearing for: *(Name of party)*

U.S. Catholic Conference

Date

August 13, 1987

Appellant

☐ Plaintiff ☒ Defendant

Appellee or Respondent:

☐ Plaintiff ☐ Defendant

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

[Filed Aug. 20, 1987]

/s/ Jon O. Newman

/s/ Amalya L. Kearse
(per J.O.N.)

/s/ Richard J. Cardamone
(per J.O.N.)